Scottish Law Commission

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DILIGENCE ON THE DEPENDENCE AND ADMIRALTY ARRESTMENTS

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PART III

ADMIRALTY ARRESTMENTS AND JURISDICTION

(1) Introductory

Arrestment of ships

3.1 In this Part we are mainly concerned with the arrestment of ships and other vessels, and their apparel and cargo, which are sometimes called a maritime "res" or maritime property. An arrestment is the proper diligence for arrestment of a ship, including a ship under construction which has acquired the identity of a ship.[1] Poinding is not competent.[2] We are not concerned in this Part with recall of arrestments of ships which is dealt with in Part II.[3]

Types of arrestment

3.2 Three types of arrestment of ships have to be considered:

(a) Arrestment in rem of a ship or her cargo in an Admiralty action in rem enforcing a maritime lien against the ship (or other maritime res), whether the lien is created by common law or statute.

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[1] McMillan p 64; Balfour v Stein 7 June 1808 F C, Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 F C. What is a ship or vessel for this purpose at common law is discussed at para 3.160 below.

[2] Bankton, IV, 41, 9.. Poinding of ships used to be competent under certain statutes but these have recently been amended: see Debtors (Scotland) Act 1987, Sch. 6, paras. 4, 9, 10, 13, 24 and 25.

[3] It is thought that the principles of recall of arrestment on the dependence on caution or consignation apply also to the recall of arrestments in rem of ships enforcing a maritime lien.

(b) Arrestment in rem of a ship under section 47(3)(b) of the Administration of Justice Act 1956 in an Admiralty action in personam to enforce a claim relating to that ship, being a claim specified in paras. (p) to (s) of s. 47(2) of the 1956 Act, though the claimant is not entitled to a lien over the ship.

(c) An arrestment in common form of a ship or other maritime res on the dependence of an Admiralty action in personam.

3.3 Some points of comparison with English Admiralty arrests. We understand that in English law there are two main types of arrests in rem under the Admiralty jurisdiction, namely (1) arrests in rem to enforce a maritime lien, whether the lien is created by common law or statute, and (2) statutory rights to arrest in rem, which have to be distinguished from arrests in rem to enforce a statutory maritime lien. A principal difference between the two types of arrest in rem relates to the point in time at which the arrest becomes effective.[1] A maritime lien has effect as a security from the moment the circumstances arise giving effect to the lien, and an arrest in rem enforcing such a lien has effect against the maritime res though ownership has been transferred to a bona fide purchaser after that moment.[2] By contrast, in the case of a statutory right to arrest in rem not enforcing a maritime lien, the arrest only has effect from a later moment in time, though there is uncertainty as to the precise moment, the possibilities being when a writ in rem (initiating an action in rem) is issued, or when a writ is served, or when a res is arrested.[3] The weight of authority seems now to favour the

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[1] See Thomas, pp 32 ff.

[2] The Bold Buccleugh (1851) 7 Moo PC 267.

[3] Thomas, p 32.

time when the writ is served.[1]

3.4 While it is often said that Admiralty law is the same in Scotland and England,[2] this statement is not altogether correct.[3] It does not apply to many aspects of procedure and diligence,[4] which form an important part of Admiralty law. The list of Scots Admiralty causes in RC 135 differs from the list of English Admiralty causes in the Supreme Court Act 1981, s. 20(2). The law on Scots arrestments in rem enforcing maritime liens is identical with, or very closely resembles, the English law on arrests in rem enforcing maritime liens.[5] On the other hand, an English statutory right to arrest in rem not enforcing a proper maritime lien differs from a Scottish arrestment of a ship on the dependence of an Admiralty action in personam, and although the Administration of Justice Act 1956 has introduced a measure of harmonisation, some differences remain eg. a Scots arrestment on the dependence has effect from the time of execution of the arrestment. There may possibly also be differences as regards

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[1] The Banco [1971] P 137, at pp 153, 158 - 159; The Berny [1979] Q B 80; Thomas, p 34.

[2] See eg Currie v McKnight (1896) 24 R (HL) 1; Boettcher v Carron Co (1861) 23 D 322; The Goring [1988] 1 AC 831 (HL) at p 853.

[3] Compare the article by Edward T Salvesen (later Lord Salvesen) "Maritime Lien for Collission" [1897] Juridical Review 34, criticising the decision and reasoning of the House of Lords in Currie v McKnight, supra. As an example of an area where the two systems of substantive Admiralty law differ, Mr Salvesen referred (at pp 38-39) to the rules regulating the employment of a vessel where the owners are not agreed. There are other differences. So far as we are aware, there is no comprehensive, systematic and authoritative comparison of the two systems of Admiralty law on which alone a sound generalisation could be based.

[4] See eg Sheaf Steamship Co v Compania Transmediterranea 1930 S C 660.

[5] Currie v McKnight (1896) 24 R (HL) 1.

attachment of "sister ships", though this may be doubted.[1] Probably the nearest Scots equivalent to an English statutory arrest in rem not enforcing a maritime lien is the somewhat anomalous arrestment in rem under section 47(3)(b) of the Administration of Justice Act 1956, to which we revert later.[2] As regards the terminology of actions, an English statutory arrest in rem not enforcing a proper maritime lien is used in what is called an Admiralty action in rem; in Scotland, an arrestment of a ship on the dependence is used in an Admiralty action in personam.[3]

Distinctive features of arrestment of ships.

3.5 Arrestments in rem of ships and arrestments of ships on the dependence have some common features and some differences. Certain common features which distinguish such Admiralty arrestments from arrestments of other types of moveable property may be summarised as follows.

(a) An arrestment on the dependence and an arrestment in rem of a ship or vessel differ from arrestments of non-maritime property in "being a real diligence directed against the vessel itself, and unlike the personal diligence of arrestment directed against a custodier or debtor in a sum of money".[4] There is no arrestee.[5] Thus a ship may be arrested though it is in the possession of the defender. The arrestment is executed by affixing the schedule of arrestment to the mast or main mast (or some other prominent part of the ship if there is no mast) and, at least in the case of arrestment in common form, chalking

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1 See para 3.61 ff; cf Inglis, p 88.

2 Para 3.49 ff.

3 Inglis, p 77; RC 136 and RC 74.

4 Carlberg v Borjesson (1877) 5 R 188 at p 195 per Lord Shand.

5 Barclay, Curle & Co Ltd v Sir James Laing & Sons Ltd 1908 SC 82 at p 89 per Lord McLaren.

the Sovereign's initials "ER" above it,[1] rather than by serving it on a third party arrestee. The arrestment is thus a "real diligence" in a procedural sense. An arrestment in rem enforcing a maritime lien is also a real diligence in a substantive law sense since, after the circumstances giving rise to the lien have occurred, the arrestment in rem may be executed though ownership of the ship has been transferred to a bona fide purchaser without notice of the lien.[2] By contrast, an arrestment of a ship on the dependence may only be executed if the defender is owner of the ship at the time of execution.

(b) The arrestment of a ship fixes or immobilises the ship in the place where she is located at the time of the execution of the arrestment and withdraws her from employment (subject to warrants and orders of the court) until a process of sale is completed or the arrestment is recalled.[3] It is a corollary of this rule that an arrestment of a ship cannot be executed while the ship is on passage.[4] An arrestment of other types of corporeal moveables merely prevents the arrestee from parting with them until the time arrives when they have to be made furthcoming to the pursuer or the arrestment is

[1] Graham Stewart p 41; RC 140(a) (arrestments in rem).

[2] Clan Line Steamers Ltd v Earl of Douglas SS Co Ltd 1913 SC 967 at p 973 per Lord President Dunedin; The Bold Buccleugh (1851) 7 Moo PC 267.

[3] See eg Carlberg v Borjesson (1877) 5 R 188 at p 195 per Lord Shand; Wolthekker v Northern Agricultural Society Ltd (1862) 1 M 211 at p 213 per Lord Benholme; Alexander Ward & Co Ltd v Samyang Navigation Co Ltd 1975 SC (HL) 26 at p 54 per Lord Kilbrandon; West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 at p 294 per Lord Weir.

[4] Carlberg v Borjesson (1877) 5 R 188; affd 5 R (HL) 215; Administration of Justice Act 1956, s 47(6).

recalled.[1]

(c) The diligence is completed by a process of sale, or in the case of an arrestment in rem a declarator of lien and process of sale, rather than by an action of furthcoming.[2]

(d) Though an action of furthcoming of arrested property is a separate process raised after a decree of constitution of the debt, a process of sale of an arrested ship may be combined with an action to constitute the debt.[3]

(e) An arrestment of a ship on the dependence and an arrestment of a ship in rem can only be executed to enforce or secure claims of a type specified in s. 47(2) of the Administration of Justice Act 1956, which appear to fall within the definition of Admiralty causes in the Rules of the Court of Session(RC 135).[4]

Both types of arrestment of ships can only be understood in the context of the common law and enactments regulating Admiralty causes and the maritime claims specified in s. 47(2) of the 1956 Act.

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[1] As to an arrestment of cargo, see para 3.91, which also mentions the possibility that arrested non-maritime property should not be removed from the jurisdiction.

[2] Graham Stewart, pp 242-245; RC 143.

[3] Taylor v Williamson (1831) 9 S 265; RC 143.

[4] See Appendix below.

Admiralty actions in rem distinguished from Admiralty actions in personam

3.6 As essential background, it may be helpful to set out what appear to us to be the main differences between an Admiralty action in rem and an Admiralty action in personam.

(1) Subject matter. An Admiralty action in rem is brought to enforce a maritime lien and contains within itself the procedures by which such a lien is "worked out" or "made good".[1] The conclusions are for:

(a) declarator that the pursuer has a (maritime) lien over the ship or cargo for a specified sum and interest;

(b) declarator that the pursuer's lien to the extent of the specified sum is preferable to the right of all others having, or pretending to have, rights in the ship or cargo;

(c) warrant to sell the ship or cargo on the lien being declared and to apply the proceeds in satisfaction of the lien or in or towards payment of the sum claimed.[2]

An Admiralty action in personam is any Admiralty cause as defined in RC 135 other than an action in rem.[3] An action in personam may be a petitory action brought to enforce the personal obligation of payment secured by a

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[1] RC 136; 137.

[2] RC Appendix, Form 2(9).

[3] Cf RC 136, 138.

maritime lien, but an action in personam does not enforce or work out the lien itself.

(2) Defenders. An Admiralty action in rem is always directed against the ship or cargo (the maritime res).[1] The action may in addition be directed against the owners or other parties interested in the ship or cargo, who must be called as defenders if known to the pursuer and who may enter appearance at any time before final judgment.[2] An Admiralty action in personam is always directed against persons called as defenders who by a special rule, may include the master of the ship as representing the owners.[3] But an action in personam is never directed against the ship herself or cargo itself.

(3) Associated diligences. An arrestment in rem of the ship or cargo encumbered by the maritime lien is not only a competent, but also an essential, incident of an Admiralty action in rem.[4] There is authority suggesting that the arrestment in rem must be executed before the commencement of the action in rem.[5] An arrestment on the dependence, by contrast, is a competent, but not an essential, incident of an Admiralty action in personam.

(4) Expenses of arrestment. It follows from the previous point that whereas the expenses of an arrestment on the dependence of an Admiralty action in personam are not

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[1] RC 136, 137.

[2] RC 137.

[3] RC 138.

[4] RC 137 (first sentence).

[5] Mill v Fildes 1982 SLT 147; see para 3.37 below.

recoverable at common law from the defender as part of the expenses of process, (because not essential to the obtaining of the decree in personam)[1], the expenses of an arrestment in rem are recoverable as part of the expenses of process because they are essential to the obtaining of decree in rem.[2]

(5) Founding jurisdiction. An arrestment in rem within the jurisdiction of a ship or cargo, of itself founds jurisdiction in an action in rem without the need for an arrestment to found jurisdiction and notwithstanding the fact that the owners or other persons interested in the maritime res are not personally subject to the jurisdiction of the court. The fact that an arrestment in rem per se carries with it jurisdiction has been recognised by statute,[3] and seems necessarily to follow from the fact that an action in rem is primarily directed against a ship or cargo and that an arrestment in rem is an essential incident or prerequisite of such an action, By contrast, in an Admiralty action in personam, jurisdiction has to be founded against the defenders whether by arrestment to found jurisdiction or otherwise (eg domicile of the defenders within the jurisdiction of the court) and an arrestment on the dependence does not suffice.[4]

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[1] See para 2.124 above.

[2] Hatton v A/S Durban Hansen 1919 S C 154.

[3] Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7; and Sch 9, para 6.

[4] For the present law on arrestment to found jurisdiction in Admiralty actions, see Anton, Civil Jurisdiction in Scotland (1984) paras 5.09; 5.57-5.58; 9.12(7); and 10.07.

(6) Differences as regards arrestment of shares in a ship. Since an Admiralty action in rem directed against a ship, and an arrestment in rem in such an action, are designed to enforce a maritime lien arising out of services rendered to, or damage done by, the ship as such,[1] it seems to follow that in principle an arrestment in rem must attach the whole ship and cannot attach merely a share, or particular shares, in the ship. By contrast, an Admiralty action in personam for payment of money enforces a debt due by a particular defender (or defenders). Accordingly where the defender owns only one or more, but not all, of the 64 shares in the ship, an arrestment on the dependence of the action in personam is used to attach only the particular share or shares owned by the defender.[2] The practical result is that a sale following an arrestment in rem always relates to the whole ship while a sale following an arrestment on the dependence relates to the shares owned by the defender which may not comprise all of the shares. On the other hand, an arrestment on the dependence of a share in a ship has the effect of detaining the whole ship since the defender has a pro indiviso share in every inch of the ship, and it so far resembles an arrestment in rem (or an arrestment on the dependence) of the whole ship.

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[1] See para 3.29 below.

[2] Graham Stewart, p 44; Monteith v Murray (1677) Mor 3685.

(2) The jurisdictional and procedural context

(a) Definition of Admiralty causes

3.7 Because of the haphazard way in which the law on Admiralty causes and maritime claims has developed, the legal definition of those causes and claims is needlessly complicated. The main complication results from the fact that the Rules of the Court of Session have, since 1934[1] (currently RC 135), defined Admiralty causes by a long list in which those causes are described by reference to their subject matter under 16 heads (paras. (i) to (xvi)) but, in order to discover whether a ship may be arrested on the dependence of an Admiralty action in personam, it is necessary to refer also to the Administration of Justice Act 1956, s. 47(2) in which the maritime claims which may be secured by an arrestment on the dependence are defined, by reference to their subject matter, in a different (though overlapping) list containing 19 heads (paras. (a) to (s)). RC 135 and s. 47(2) are set out in the Appendix at the end of this Discussion Paper.

3.8 Admiralty causes and arrestments on the dependence. The arrestment of a ship is in origin an admiralty process which before 1830 was authorised by a warrant granted by the Judge-Admiral of the High Court of Admiralty of Scotland. The arrestment was competent on the dependence of an action under a warrant granted by the ordinary courts of law provided that the concurrence of the Judge-Admiral was obtained but in strict law it was his concurrence which formed the warrant.[2] In 1830, the

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[1] Act of Sederunt approving the Rules of Court dated 19 July 1934; and see Act of Sederunt Consolidating Rules of Court 1936, (S R & O 1936/88) Chapter III, Rule 1.

[2] Mackenzie v Campbell (1829) 7 S 899.

High Court of Admiralty was abolished and its jurisdiction in civil maritime causes and proceedings was transferred to the Court of Session[1] and sheriff courts.[2] The result is that in an action for payment of money, it is competent to arrest a ship, on the dependence on a warrant in a signeted Court of Session summons, or a sheriff court ordinary cause initial writ or summary cause summons.[3] It seems that before 1956 the action in question did not have to be an Admiralty cause.[4]

3.9 Originally Admiralty causes consisted of maritime causes as defined by the common law[5] and also specific types of cause in which jurisdiction was assigned by particular enactments to Admiralty courts.[6] The only common law definitions were those of

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1 Court of Session Act 1830, s 21.

2 Ibid s 22 (repealed); see now Sheriff Courts (Scotland) Act 1907, s 4.

3 Cf HM Advocate v Murray 1925 SLT (Sh Ct) 6 (arrestment of ship on dependence of small debt action).

4 This would appear to follow from Mackenzie v Campbell (1829) 7 S 899; and see Inglis, p 76.

5 The Admiralty Court Act 1681, record edn c 82, 12mo edn c 16 (repealed by SLR in 1964) declared that the court had a privative original jurisdiction "in all maritime and seafaring causes forreigne and domestick whether civil or criminal whatsoever within this realm" but did not define "maritime causes".

6 eg Foreign Enlistments Act 1870, ss 19, 30 (still in force); Merchant Shipping Act 1894, s 167(3)(now repealed); Merchant Shipping (Stevedores and Trimmers) Act 1911 (now repealed), all discussed in Encyclopaedia, vol 1 (1926) pp 154-155.

the Institutional writers which were in general terms.[1]

3.10 The Clyde Report on the Court of Session[2] (1927) recommended that there should be a separate list or roll of Admiralty and Commercial Causes, which would have their own specialties of procedure (including in the case of Admiralty actions, arrestments in rem and preliminary acts in maritime collision cases) and would give the parties facilities for simplifying and cheapening the procedure.[3] The report stated that "Admiralty cases may be said to define themselves".[4] Under powers first conferred in 1933,[5] the Rules of the Court of Session enact the definition of Admiralty causes set out in the Appendix to this Discussion Paper.[6] The Clyde Report also recommended the introduction of a new form of arrestment in rem enforcing a maritime lien under a warrant contained in a signeted summons and these were introduced under powers conferred in 1933. We revert to these below.

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[1] See Erskine, Institute I, 3, 33; Bell, Commentaries, vol 1, p 546. Bell defined them as actions "relative to charter-parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea insurance without any regard to the place of contract as executed on sea or land". There was doubt whether claims arising from maritime insurance were maritime, since they were no longer treated as maritime in England: see Encyclopaedia vol 1, pp 154-155.

[2] Report of the Royal Commission on the Court of Session and the Office of Sheriff Principal Cmd 2801 (Chairman: Lord President Clyde).

[3] Ibid p 55 and pp 67 ff. Previously Admiralty causes had no special procedure of their own: ibid p 67.

[4] Ibid p 72.

[5] Administration of Justice (Scotland) Act 1933, s 17(i); consolidated as Court of Session Act 1988, s 6(i).

[6] RC 135.

3.11 The list of Admiralty causes is expressed to be inclusive rather than exhaustive.[1] There is no comparable list in the sheriff court ordinary or summary cause rules and in practice Admiralty causes are treated as being the same in the sheriff court as in the Court of Session,[2] so that the list is construed as applying also in the sheriff court. The sheriff court has exclusive jurisdiction in Admiralty causes below £500 in value and otherwise concurrent jurisdiction with the Court of Session except in relation to salvage where there are special provisions.[3]

3.12 Statutory restriction on arrestment of ships. Under the Administration of Justice Act 1956, s. 47(1), an arrestment on the dependence and an arrestment in rem have effect "as authority for the detention of a ship" but only if the action involves one of the claims in the statutory list in s. 47(2) and, in the case of an arrestment on the dependence, either the arrested ship is the ship with which the action is concerned, or all the shares in the ship are owned by the defender. It is thought that the statutory prohibition of detention of a ship implies a prohibition of arrestment, ie. it renders an arrestment incompetent or ineffectual,[4] and is not simply a prohibition of physical detention

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1 It has been suggested that it is probable that the definition "will now in practice be definitive": Stair Memorial Encyclopaedia, vol 1, para 411.

2 Macphail, p 61.

3 See para 3.16 below. There is also a minor and unimportant exception under the Foreign Enlistment Act 1870, s 19 (jurisdiction in respect of forfeiture of ships for offences against Act) as read with the definition of "Court of Admiralty" in s 30, confining jurisdiction to the Court of Session.

4 See eg William Batey (Exports) Ltd v Kent 1987 SLT 557 at p 561; Gatoil International Inc v Arkwright- Boston Manufacturers Mutual Insurance Co 1985 SLT 68 (HL) at p 71.

of a ship under a competent arrestment.[1] Section 47 of the 1956 Act (like Part I which dealt with Admiralty jurisdiction and arrest of ships in England and Wales and Schedule 2 containing similar provisions for Northern Ireland) was enacted to enable the United Kingdom to ratify and to comply with the International Convention relating to the Arrest of Seagoing Ships signed at Brussels on May 10, 1952.[2] Before the passing of the 1956 Act, the maritime claims falling within the jurisdiction of the High Court in England were limited to those listed in the Supreme Court of Judicature (Consolidation) Act 1925, s. 22. This jurisdiction was exercisable in proceedings in rem or in personam. This list was adopted, as part of a compromise, by the Brussels Convention Articles 1-3 and was then made applicable (with minor modifications) to England by section 1 of the 1956 Act (now consolidated in the Supreme Court Act 1981, s.20) and to Scotland by section 47. The Convention and the 1956 Act represent a compromise which inter alia (a) narrows the wide powers of arrestment available to Scotland and civil law countries which based jurisdictional competence on the presence of property within the territorial jurisdiction and arrestment thereof ad fundandem jurisdictionem and allowed arrestment of such property on the dependence under general common law powers not confined to Admiralty causes or particular ships, and (b) widens (by allowing the arrest of 'sister ships' in certain circumstances) the relatively narrow powers of arrest available in England and other common law countries under which the power of arrest only arose in respect of Admiralty claims based upon a maritime lien, or a statutory right to arrest in rem, and only affected the particular ship in respect of which the claim arose.

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[1] Cf Stair Memorial Encyclopaedia, vol 1, para. 417.

[2] See Singh, International Conventions of Merchant Shipping (2nd edn) p 1438 ff (British Shipping Laws, vol 8). The background to the 1956 Act is explained in Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68 (HL) per Lord Wilberforce and Lord Keith; and The Eschersheim [1976] 1 WLR 430 per Lord Diplock.

3.13 In the result English law defines Admiralty actions by reference to the statutory list enacted to implement the 1952 Convention in England and Wales whereas Scots law retains a separate list of Admiralty Causes in RC 135 which is different from the statutory list (in s. 47(2) of the 1956 Act) introduced to implement that Convention in Scotland. We think that Admiralty actions in Scotland should in future be defined by reference to the list of claims set out in section 47(2) of the 1956 Act for the following reasons. First, we think that the criterion should be not, or not only, that the subject matter of the cause is associated with the sea or has a maritime character, but rather that the claim is enforceable by an Admiralty arrestment of a ship or her cargo, whether in rem or on the dependence. This point was made in the 1920s by A R G McMillan who criticised the definitions of Admiralty causes by Bell and Erskine,[1] and observed:

> "Neither writer appears to have appreciated that the true ratio of an action in Admiralty is that it is one in which the most appropriate and most effective remedy lies in proceeding directly against the ship, and it is in this that the chief justification for the retention of an Admiralty Court as a court of instance is found".[2]

Elsewhere he remarked:

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[1] Bell, Commentaries, vol 1, p 546; Erskine Institute I, 3, 33. McMillan remarks: "...while Bell bases his definition on the general ground of association with the sea, irrespective of the place of contract or performance, Erskine makes performance 'within the verge of the Admiral's jurisdiction' the foundation of his definition". See A R G McMillan, "The Scottish Court of Admiralty: A Retrospect" (1922) 34 Juridical Review 38, 164 at p 167.

[2] A R B McMillan, loc cit (previous note).

> "Admiralty jurisdiction is essentially a jurisdiction over ships, and its primary importance is that it recognises and provides procedure for enforcing rights in ships of a special character".[1]

These remarks have gained added force with the divergence between the list of Admiralty causes in RC 135 and the list of claims in section 47(2) of the 1956 Act which may alone be secured by Admiralty arrestments. It seems to us anomalous and pointless to preserve as Admiralty causes in terms of RC 135 actions in which Admiralty arrestments in rem or on the dependence of ships and other maritime property is not competent because they are not actions to enforce a claim specified in section 47(2) of the 1956 Act. Second, definition of Admiralty causes by reference to the 1956 Act, s 47(2), would clarify and simplify the law and effect a desirable measure of harmonisation with English Admiralty law and practice. Third, insofar as the original aim of the Clyde Report was to provide a simple procedure in maritime causes, that aim would be better achieved by raising the action as a commercial action,[2] in the case of actions specified in RC 135 but not in s. 47(2) of the 1956 Act, eg marine insurance claims.[3]

3.14 It would be for consideration whether the foregoing proposal should be implemented by an amendment by act of sederunt of RC 135, or whether Admiralty causes should be defined by primary legislation. Given that the definition should

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[1] Scottish Maritime Practice p 7.

[2] See RC 148-151F, inserted by Act of Sederunt (Rules of the Court of Session Amendment No 4) (Commercial Actions) 1988.

[3] Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68; "The Aifanourios" 1980 SC 346.

apply in the sheriff court[1] and that the definition must reflect and conform to the Brussels Convention of 1952, and thus is not an ordinary rule of procedure over which the Court of Session has full control, primary legislation might be more appropriate.

3.15 We propose:

(1) **Admiralty causes in Scots law should be defined by reference to the list of claims specified in the Administration of Justice Act 1956, section 47(2) (which restricts the competence of Admiralty arrestments to arrestments securing claims specified in that list).**

(2) **The definition should apply expressly for the purposes of the Admiralty jurisdiction of the sheriff court as well as that of the Court of Session.**

(3) **It is suggested that the definition should be embodied in primary legislation.**

(Proposition 26).

(b) Jurisdiction of sheriff court in salvage actions

3.16 While we are not primarily concerned in this Discussion Paper with the subject matter jurisdiction of the sheriff court, we think that there is one topic affecting that jurisdiction which

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[1] We propose later that specialities affecting sheriff court Admiralty actions relating to salvage should be abolished: see para 3.16 ff.

might be dealt with in the proposed legislation on Admiralty cause arrestments which may eventually follow on this Paper. We understand that considerable difficulties are experienced by practitioners of Scots maritime law, especially when representing pursuers, by reason of the fact that the jurisdiction of the sheriff to entertain actions relating to salvage is very confused and uncertain as a consequence of the provisions of the Merchant Shipping Act 1894, s. 547. Subsections (1) and (2) of that section provide:

> "(1) Disputes as to the amount of salvage whether of life or property, and whether rendered within or without the United Kingdom arising between the salvor and the owners of any vessel, cargo, apparel, or wreck, shall, if not settled by agreement, arbitration, or otherwise, be determined summarily in manner provided by this Act, in the following cases; namely:-
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> (a) In any case where the parties to the dispute consent:
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> (b) In any case where the value of the property saved does not exceed one thousand pounds:
>
> (c) In any case where the amount claimed does not exceed in Great Britain three hundred pounds, and in Ireland two hundred pounds.
>
> (2) Subject as aforesaid, disputes as to salvage shall be determined by the High Court in England or Ireland, or in Scotland the Court of Session, but if the claimant does not recover in any such court in Great Britain more than three hundred pounds, and in any such court in Ireland more than two hundred pounds, he shall not be entitled to recover any costs, charges or expenses incurred by him in the prosecution of his claim, unless the court before which the case is tried certify that the case is a fit one to be tried otherwise than summarily in manner provided by this Act."

The three paragraphs in s. 547(1) have to be read disjunctively rather than cumulatively. Where a salvage claim falls under one of these three paragraphs, the claim is to be determined summarily, which entails that it is to be determined by the sheriff court.[1] This is generally construed as meaning that the proceedings take the form of an action,[2] which in effect means a summary cause having regard to the upper jurisdictional limits of summary causes, and lower jurisdictional limit of ordinary causes, (£1,500).

3.17 The principal difficulty stems from doubts concerning the scope of the provision. There is authority that since section 547(1) applies in terms only to "disputes as to the amount of salvage" (emphasis added), it follows that where the parties are in dispute as to the question whether or not salvage services have been rendered at all, an action may be competently brought in the sheriff court.[3] This provision, however, puts the pursuer and his advisers in a very difficult position because at the time when the action has to be raised and the salved vessel arrested, the pursuer may not know whether the defender is going to dispute liability for salvage services, or merely the amount of the salvage due. The difficulty is compounded by the fact that the salved vessel may be in a Scottish port for a very short time before being taken to a foreign port. It has been argued that if it is not clear at the time when the action is raised whether the dispute is about liability or merely the amount of salvage the action may be competently raised and that, if it should later emerge that only the amount is disputed, the action remains competent since in

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[1] 1894 Act, s 547, subs. (1) as read with subs. (4)(b).

[2] Cf Dobie, Sheriff Court Practice p 620; Thirtle v Copin (1912) 29 Sh Ct Rep 13.

[3] Thirtle v Copin (1912) 29 Sh Ct Rep 13 at p 19; Waterford and Duncannon Steamboat Co Ltd v Ford Shipping Co Ltd (1915) 2 SLT 192; Dobie, Sheriff Court Practice, p 620.

principle the tempus inspiciendum for ascertaining the competence of an action is the time of service of the summons. An action competent when raised is not as a general rule rendered incompetent by subsequent events. The contrary view is that if the defender only disputes the amount of salvage and never disputes liability, the action was originally not competent even though this fact may not emerge till the action is in dependence.

3.18 Another criticism of s. 547(1) is that the limit of £1,000 on the value of the salved ship, and of £300 on the pursuer's claim, have never been amended since 1894 and must now be considered as out-of-date. We do not believe, however, that updating the monetary limits would be satisfactory since we consider that section 547 should be repealed so far as applying to Scotland. Approaching the matter from a different angle, the Grant Report reached the same conclusion, observing:

> "It seems to us that [section 547] was probably drafted with the English county courts in mind and without having regard to the otherwise unlimited jurisdiction of the sheriff court in petitory actions. We see no reason why an action for salvage, more than other petitory actions in the sheriff court, should be subject to an upper limit, and we recommend that the jurisdiction of the sheriff court in actions of salvage under section 547 of the Merchant Shipping Act 1894 should be unlimited".[1]

3.19 We respectfully agree with these observations, except that, as a pure matter of legislative technique, the better course may be simply to repeal s. 547 of the 1894 Act quoad Scotland since section 4 of the Sheriff Courts (Scotland) Act 1907 confers jurisdiction in Admiralty causes (and therefore - but for s. 547 of

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[1] Grant Report, para 155 and recommendation 36.

the 1894 Act - in all salvage actions) on the sheriff court.[1]

3.20 We propose:

> **The sheriff court should continue to possess jurisdiction to entertain actions relating to salvage under the Sheriff Courts (Scotland) Act 1907, s. 4, but free of the restrictions on that jurisdiction imposed by section 547 of the Merchant Shipping Act 1894 (actions for determining disputes as to the amount of salvage) which should be repealed so far as it applies to Scotland.**

(Proposition 27)

(c) Sheriff court procedure in Admiralty actions

3.21 It is an unusual feature of Admiralty practice that whereas the procedure in Admiralty actions in the Court of

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[1] Cf Waterford and Duncannon Steamboat Co Ltd v Ford Shipping Co Ltd (1915) 2 SLT 192, where Sheriff Fyfe argued that because the Merchant Shipping Act 1894, s 547, is inconsistent with the 1907 Act, s 4, it must be taken to have been repealed by s 52 of the 1907 Act. This view has not however been generally accepted presumably because of the principle of statutory construction that a general enactment (the 1907 Act, s 4) does not derogate from a specific enactment (the 1894 Act, s 547).

Session is closely regulated by rules of court specially adapted to such actions,[1] no corresponding provision is made in the sheriff court rules of procedure. We have not been able to discover any rational ground for this gap in the sheriff court procedural rules. It appears that any gaps in the sheriff court ordinary cause or summary cause rules of procedure may be filled by following the special Court of Session rules relating to Admiralty actions. Thus, in a sheriff court action for recovery of arrears of payment under three ship mortgages, the Second Division on appeal held that it was competent for the sheriff to follow the procedure for sale of an arrested ship set out in RC 143 for the Court of Session.[2] It seems to us that this gap in the sheriff court rules is likely to cause difficulties in practice and that it would be more convenient for sheriff court practitioners and others if special sheriff court rules of procedure for Admiralty causes were to be introduced.

3.22 We propose:

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[1] RC 135-147.

[2] Banque Indo Suez v Maritime Co Overseas Inc 1985 SLT 117. In that case it was observed (at pp 119 and 121) that section 4 of the Sheriff Courts (Scotland) Act 1907 provides that all powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings shall be competent to the sheriffs. This enactment however replaces the Court of Session Act 1830, s 22, and seems to refer to the High Court of Admiralty (which was abolished by the 1830 Act) rather than to the Court of Session. The true ratio of the case probably lies in the power of the sheriff to resort to Court of Session practice for guidance to fill a lacuna in sheriff court rules of procedure: see Macphail, p 22; Tait v Main 1988 SCLR 106 (Sh Ct) at p 109 per Sheriff Principal Ireland.

Separate rules of court (modelled on RC 135-147) governing procedure in Admiralty actions in the sheriff court should be introduced.

(Proposition 28).

(d) Sheriff court arrestments in rem and actions in rem

3.23 At present, certain of the rules allowing arrestments of ships and their cargo outside the jurisdiction of the sheriff court granting the warrant appear to apply to arrestments in rem. Thus the Ordinary Cause Rules, rule 16, and the Summary Cause Rules, rule 11, enable a warrant for arrestment and other types of warrant to be executed anywhere in Scotland without the endorsation of a warrant of concurrence by the sheriff clerk of the sheriff court where the warrant is to be executed. These rules do not expressly exclude arrestments in rem. (Nor do they expressly exclude arrestments to found jurisdiction though to apply them to arrestments to found jurisdiction would be inconsistent with the purpose of such arrestments so that such arrestments are probably excluded by implication). Similar provision is made by the Debtors (Scotland) Act 1987, s. 91, though that section very properly does not apply to arrestments in rem.

3.24 In our view, it should not be competent to arrest in rem a ship or cargo outside the jurisdiction of the sheriff court in which the action in rem is to be raised, nor should an arrestment in rem outside that jurisdiction be rendered competent by a warrant of concurrence. An action in rem is primarily directed against a ship or cargo and in principle the ship or cargo should be, or have been, arrested in rem within the jurisdiction of the sheriff court entertaining the action in rem. Any other rule would mean that

an action in rem could be raised in a sheriff court with which the ship or cargo concerned had no connection whatsoever. For example, a warrant for arrestment in rem could be obtained in Glasgow sheriff court and executed against a vessel plying between Aberdeen and Shetland though that vessel had never been, and (but for the arrestment) would never be, near the sheriffdom of North Strathclyde. In an action in personam, jurisdiction is founded against a defender independently of the use of an arrestment on the dependence, on the basis of jurisdictional rules (eg relating to the defender's domicile) so that the action has some connection with the sheriff court entertaining it and an arrestment on the dependence outside the sheriff court's jurisdiction does not have the effect of giving the sheriff court an exorbitant or inappropriate jurisdiction. An arrestment in rem outside the jurisdiction however would indeed have that effect, and is best avoided.

3.25 Section 4 of the Sheriff Courts (Scotland) Act 1907 provides that the powers and jurisdictions competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings should be competent to the sheriff-principal (or sheriff) "provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the sheriff-principal [or sheriff] before whom such cause or proceeding may be raised...". This proviso is not appropriate in the case of an action in rem which is directed against a ship or cargo irrespective of whether the owners or parties interested in the ship or cargo are subject to the sheriff's jurisdiction. We suggest that the foregoing proviso should be amended by confining it to an Admiralty action in personam.

3.26 We propose:

(1) It should be clearly provided by statute that a warrant to arrest in rem a ship or other maritime res granted by a sheriff court should only be capable of execution within the jurisdiction of that sheriff court.

(2) Further, it should not be competent to circumvent the foregoing rule by obtaining a warrant of concurrence from the sheriff clerk of a different sheriff court, and accordingly warrants of concurrence relating to arrestments in rem should be incompetent.

(3) Section 4 of the Sheriff Courts (Scotland) Act 1907, (which inter alia confers on the sheriff Admiralty jurisdiction in maritime causes and proceedings, provided that the defender is amenable to the sheriff's jurisdiction) should be amended to make it clear that the sheriff's jurisdiction in an Admiralty action in rem directed against a ship or cargo is founded on an arrestment in rem of the ship or cargo notwithstanding that the owners or persons interested in the ship or cargo are not, or not otherwise, amenable to the sheriff's jurisdiction.

(Proposition 29).

(3) Particular types of Admiralty arrestment and proposals for reform

3.27 In this Section we describe the different types of Admiralty arrestment and consider whether warrants for (a)

arrestments in rem enforcing maritime liens, (b) arrestments in rem under s. 47(3)(b) of the Administration of Justice Act 1956 and (c) arrestments (and indeed inhibitions) on the dependence of Admiralty actions in personam, should be available to the pursuer as a matter of right or only at the court's discretion, or whether a compromise solution should be adopted as suggested in Part II. We also take the opportunity of proposing some minor amendments of the 1956 Act.

(a) Arrestment in rem enforcing maritime liens

3.28 Maritime liens.[1] A maritime lien is a form of security, over a maritime res (ie. a ship or her apparel or cargo) enforceable in Scotland by an Admiralty action in rem in which the res is attached by an arrestment in rem, declarator of the lien is granted, and the res is thereafter sold in a judicial sale. It is a hypothec or security without possession and thus differs from other forms of lien (eg a repairer's lien) in which the security depends on the creditor's possession. It differs from a mortgage of a ship in that it arises by operation of law from the moment the circumstances arise which are the source of the claim it secures, and it is not registrable in a public register. It has been held that the substantive law on maritime liens is the same in Scots law and English law.[2]

3.29 Types of maritime lien. Five "principal" or "proper" maritime liens are recognised by Scots law and English law, namely those arising in respect of:

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[1] See Thomas Maritime Liens (1980); Encyclopaedia vol 9, p 388, s v "Maritime Liens"; Stair Memorial Encyclopaedia, vol 1, p 203.

[2] Currie v McKnight (1896) 24 R(HL) 1.

(1) damage done by a ship;

(2) bonds of bottomry or respondentia (now obsolete);

(3) seamen's wages;

(4) master's wages and disbursements; and

(5) salvage.

It will be seen that the first arises ex delicto from a wrong done by a ship. The last four arise from services rendered to a ship. The bottomry or respondentia lien, the seamen's wages lien, and the master's wages and disbursements lien all arise ex contractu and the salvage lien arises quasi ex contractu. The master's wages and disbursements lien is a creature of statute (currently the Merchant Shipping Act 1970, s. 18) while the others derive from the common law, though modified by statute. It is unlikely that further maritime liens will be recognised at common law, eg, in respect of towage or pilotage.

3.30 Other maritime liens have been created by statute. These appear to consist of[1]:

(1) the fees and expenses of the receiver of a wreck (Merchant Shipping Act 1894, s. 567(2));

(2) remuneration for services rendered by coastguards (MSA 1894, s. 568(1));

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[1] See Thomas, paras. 20 to 25.

(3) compensation to owners or occupiers of land for damage occasioned in cases of shipwreck (MSA 1894, s. 513(2));

(4) rights to life and property salvage (MSA 1894, ss. 544 and 546); and

(5) (possibly) damage to a harbour, dock, pier, quay or works: Harbours, Piers and Docks Clauses Act 1847, s. 74.

3.31 Statutory restriction on arrestment in rem. Under the Administration of Justice Act 1956, s. 47(1), an arrestment in rem is competent only if the action involves one of the claims in the statutory list in s. 47(2). These include the principal maritime liens,[1] and in terms of s. 48(e), statutory liens implied in the Merchant Shipping Act 1894, ss. 544 and 546. It is not clear to us that they would include all the other statutory liens mentioned in the preceding paragraph.[2].

3.32 Effect of maritime lien and distinction between arrestment in rem and arrestment on the dependence. A maritime lien gives the creditor a hypothec or security without possession from the moment when the circumstances occur out of which the lien arises.[3] The effect of an arrestment in rem is not to create a nexus or security over the res, because a nexus or hypothec already exists, but rather to fix the res in the place where it is when the arrestment in rem is executed. It has been called "a real diligence" but as we mentioned at para. 3.3 above that

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[1] See paras. (a), (c), (h), (n) and (o) of s. 47(2).

[2] Viz under the Merchant Shipping Act 1894, ss. 567(2); 568(1); and 513(2); or the Harbours, Piers and Docks Clauses Act 1847, s. 74.

[3] See eg Thomas, p 2.

expression has been used in two quite different senses. In its first sense, it means a diligence which fixes the ship in the place in which it was arrested, and in this sense an arrestment in common form of a ship on the dependence of an Admiralty cause in personam is also a "real diligence". Arrestments of non-maritime moveable subjects on the dependence of personal or petitory actions do not have the effect of fixing the subjects in a particular place. This is the sense in which the expression "real diligence" was used by Lord Shand in an oft-quoted passage in Cariberg v. Borjesson.[1] The concept of "real diligence" may however mean a diligence which is good against the whole world or at least bona fide purchasers without notice of the lien and that concept is appropriate for maritime liens enforced by arrestments in rem but not for the right or nexus created by arrestments in common form on the dependence of Admiralty actions in personam. Thus an arrestment on the dependence of a ship is not competent unless the defender is owner of the ship at the time of execution of the arrestment. A maritime lien by contrast follows the res into whose hands so ever it comes. It is indefeasible by change of possession or even by transfer of property.[2] For this reason an arrestment on the dependence in common form is an inappropriate form of diligence to enforce a maritime lien. As Lord President Dunedin observed (with respect to a damage maritime lien):[3]

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[1] (1877) 5 R 188 at p 195: "The arrestment of a vessel differs from an ordinary arrestment in being a real diligence directed against the vessel itself, and unlike the personal diligence of arrestment directed against a custodier or debtor in a a sum of money. Its effect, as the term "arrest" itself implies, is to fix the vessel in the place in which she is found, and, if there is any danger of her being removed from the place, the power to dismantle may be exercised".

[2] Encyclopaedia, vol 9, p 388.

[3] Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967 at p 973.

> "But the working out of the maritime lien must be by effectuating a sale of the ship as a real diligence against all and sundry and not merely against the person who is called in the petitory part of this action and asked to submit to a decree. If it is a good lien, the ship can be sold, and it does not matter to whom the ship belongs. Now if that is so, that seems to me to make an arrestment on the dependence an inappropriate form of diligence, because you are not there working out your payment out of the property of the debtor; you are not dealing with a debtor; you are dealing with the ship itself, which is supposed, so to speak, to be[1] the living agent of the wrong that has been done to you".

It follows from the foregoing that whereas at common law an arrestment on the dependence is competent against a 'sister ship' or other property of the defender and not merely the ship in respect of which the claim arose,[2] an arrestment in rem may only be executed against the ship (or other property) encumbered by the maritime lien which the arrestment in rem enforces.

3.33 Development of arrestment in rem and action in rem. Until procedural reforms in the 1930s, the procedure in Scottish proceedings in rem enforcing a maritime lien required a petition in the Bill Chamber, or to the sheriff, for warrant to arrest the vessel in rem before an action in rem, (ie. an action of declarator of the maritime lien and a warrant for sale of the ship) could be raised.[3] A warrant for arrestment in rem in a signeted summons

[1] The reference to "living agent" reflects the "personification theory" of maritime liens: see Thomas, p 7; Holmes, The Common Law pp 24-30.

[2] Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68 at p 71 per Lord Keith of Kinkel.

[3] See eg Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967; McConnachie 1914 SC 853; Hatton v A/S Durban Hansen 1919 SC 154; Ellerman's Wilson Line Ltd v Commissioners of Northern Lighthouses 1921 SC 10.

in an action in rem was incompetent. The Clyde Report[1] criticised the preliminary procedure as "cumbrous and expensive to a degree which makes resort to the action in rem, familiar in England, rarely practicable". The report recommended:[2]

> "What is required is a simple action in rem against the ship herself and all persons interested in her (without naming them) for declarator of the lien, for the sale of the ship, and for the application of the proceeds in extinction pro tanto of the lien, on the signeting of which warrant to arrest the ship should pass (without the necessity of any preliminary petition) in the same manner as we recommend with regard to other forms of arrestment".

This recommendation was implemented by rules of court made under the Administration of Justice (Scotland) Act 1933, s. 17(iii).[3] An action in rem is an Admiralty cause[4] concluding for declarator of the maritime lien, for declarator that the lien is preferable to the rights of all others in the ship, and for warrant to sell and to apply the proceeds of sale in satisfaction of the lien.[5]

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[1] Clyde Report p 42.

[2] Ibid p 43.

[3] Consolidated in the Court of Session Act 1988, s 6(iii). This requires (not merely empowers) the Court of Session to provide by act of sederunt "for enabling the enforcement of a maritime lien over a ship by an action in rem directed against the ship and all persons interested therein without naming them and concluding for the sale of the ship and the application of the proceeds in extinction pro tanto of the lien, and for enabling arrestment of the ship on the dependence of such an action, and for the regulation of the procedure in any such action".

[4] RC 135 defines Admiralty causes by reference to a list of claims described by reference to their subject matter. Para (xvi) refers to maritime liens.

[5] RC, Appendix, Form 2(9).

3.34 Obtaining warrant for arrestment in rem under present procedure. A warrant for arrestment in rem, as well as a warrant for arrestment on the dependence, or both forms of warrant, may now be obtained in a signeted summons[1] or initial writ[2] or summary cause summons.[3] The procedure by way of special application for a warrant for arrestment in rem is now unnecessary and apparently incompetent. A warrant for arrestment in rem of a ship, being directed against the ship itself, must specify the ship whereas in a warrant for arrestment on the dependence, while it is normal practice to specify the ship to be arrested, it is not essential at common law.[4]

3.35 Arrestment in rem as indispensable incident of action in rem. RC 137 (Actions in rem) provides:

> "In proceedings by action in rem directed against a ship or cargo the ship or cargo shall be arrested under an arrestment hereinafter referred to as an arrestment in rem. Such arrestment may be effected upon a warrant to arrest contained in the summons".

This rule makes it clear that the ship or cargo must be arrested in rem. The provision does not however expressly prescribe the stage in the proceedings at which the arrestment in rem must be executed. It seems that warrant for arrestment in rem can only be obtained by filling in the appropriate blank in the form of summons as provided for in RC 74. Thus, RC 140 defines the mode of arrestment of a ship in rem, but is limited to the case where the summons as signeted bears warrant for arrestment in

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[1] RC 74, 137.

[2] OCR.

[3] SCR.

[4] Clark v Loos (1853) 15D 750.

rem (as provided for in RC 74). Moreover, whereas the court has power under RC 74(d) to grant warrant for arrestment on the dependence where the pursuer has not obtained such a warrant in the signeted summons, the court has no corresponding express power to grant warrant for arrestment in rem where such a warrant has been omitted from the summons in an action in rem.

3.36 In Mill v. Fildes,[1] the pursuer raised an Admiralty action in personam, arrested the ship on a warrant to arrest on the dependence and to found jurisdiction, and subsequently amended the summons by adding the words "in rem" to the instance and a conclusion for declarator of a maritime lien. A warrant to arrest in rem was not, however, obtained presumably because RC 74(d) does not empower the court to grant such a warrant. The action in rem was dismissed as incompetent on the ground that RC 74 and RC 140 showed that an arrestment in rem was the indispensable basis for "effecting a lien over a ship". Unfortunately that phrase is ambiguous. If it means that an arrestment in rem "creates" the lien, it is unsound, since the lien is created by the factual incident giving rise to the lien,[2] and the arrestment in rem only secures, or gives effect to, the pre-existing lien by immobilising the ship and preventing its removal by persons affected by the lien, who include bona fide purchasers not affected by an arrestment in personam.

3.37 It is thought that the decision was correct not because an arrestment in rem effects or creates a maritime lien but because (a) the pursuer could not comply in that process with the mandatory direction in RC 137 that the ship must be arrested in rem since the court has no power to grant warrant to arrest in

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[1] 1982 SLT 147.

[2] See paras 3.3; 3.32 above.

rem after the summons was signeted and because under RC 140 an arrestment in rem can only be executed in pursuance of a warrant to arrest in rem in a signeted summons, and (b) the Rules of Court may be construed as requiring by implication that an arrestment in rem should be executed before service of the signeted summons in an action in rem. Thus, in Mill v. Fildes, the court appears to have accepted[1] the pursuer's contention that "without a specific arrestment in rem there could be no action in rem".[2] Since an action is raised when the summons is served, it would follow that the execution of the arrestment in rem should precede the service of the summons. This is not an onerous requirement since it reflects what a prudent pursuer would do any way to preserve the element of surprise.

3.38 This raises the question of why as a matter of legal policy an arrestment in rem should be the indispensable basis of an action in rem. The reason seems to be that an action in rem has to contain within itself not only a declarator of the maritime lien but also an attachment, which is effectual against all parties who have an interest in the ship or other maritime res encumbered by the maritime lien, followed by a process of sale which must be equally effectual since it disencumbers the res of all those interests. Without an arrestment in rem, a bona fide third party purchaser of the ship could competently take the ship away, if it had been arrested in personam after the ownership had been transferred to him.

3.39 Conversion of action in personam into combined action in rem and in personam. The Rules of Court may however be criticised as unduly restrictive insofar as a pursuer in the position

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[1] 1982 SLT 147 at p 150.

[2] Ibid at p 148.

[3] 1982 SLT 147.

of the pursuer in Mill v. Fildes,[3] who has merely raised an action in personam, does not seem to have any means of converting the action into a combined action in rem and in personam. It is therefore for consideration whether a procedure should be introduced by act of sederunt whereby a pursuer who has raised an Admiralty action in personam may apply to the court for a warrant to arrest in rem, and an order allowing service of an amended summons containing an amended instance and conclusion for a declarator of the maritime lien and for sale (under RC 143).

3.40 Property encumbered by maritime lien and subject to arrestment in rem. The types of maritime res or property capable of being encumbered by a maritime lien vary with different types of maritime lien. The position seems to be as follows:[1]

(a) the damage maritime lien encumbers the ship and freight[2];

(b) the bottomry and respondentia maritime lien encumbers the ship, freight and cargo;[3]

(c) the seamen's wages maritime lien encumbers the ship and freight;[4]

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[1] See Thomas, para 37.

[2] Encyclopaedia, vol 9, p 398; McMillan, p 176; Thomas, paras. 225-226.

[3] Encyclopaedia, vol 9 pp 389, 395-398; McMillan, pp 157-158; Bell, Com vol 1, p 535; Thomas, para 382.

[4] Encyclopaedia, vol 9, p 399; McMillan, p 280; Thomas, para 318.

(d) the master's wages and disbursements maritime lien encumbers the ship and freight;[1] and

(e) the salvage maritime lien encumbers the ship, freight, cargo, flotsam, jetsam, lagan, derelict and wreck.[2]

References to the ship include references to its appurtenances and apparel.

3.41 Arrestment in rem of cargo. It will be seen that the salvage maritime lien and the (obsolete) bottomry and respondentia maritime lien encumber cargo. The mode of execution of an arrestment in rem of cargo is governed by RC 140 (a) and (b). A copy of the arrestment schedule is normally given to the ship's master if the cargo is on board,[3] or, if the cargo is being or has been landed or transhipped, to the custodier or harbour-master.[4]

3.42 Enforcement of maritime lien against freight. It is thought that it is incompetent for a lien holder whose lien covers freight to arrest in rem freight in the hands of the person liable to pay the freight. Thus RC 136(a) enables an action in rem, or a combined action in rem and in personam, to be brought "against the owners or parties interested in a ship or cargo" where the conclusions of the action are directed "to recovery in respect of a lien against the ship or cargo or the proceeds thereof, as sold under an order of court". No mention is made of freight. In

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[1] Encyclopaedia, vol 9, p 399; McMillan, pp 282-283; Thomas, paras 318, 359.

[2] Encyclopaedia, vol 9, p 399; McMillan, p 218; Thomas, paras 278 - 286, which explains the terms used in the text.

[3] RC 140(a). See para 3.81 below.

[4] RC 140(b).

Lucovich, Petitioner,[1] a petition for warrant to arrest in rem to enforce a bottomry bond under the pre-1933 Act procedure (when warrants could not be inserted in the summons), the prayer was to grant warrant to arrest the ship and its apparel and "the freight due by the various receivers of the cargo discharged by the said steamship at Leith". The interlocutor however only granted warrant to arrest the ship. This case is not of course conclusive but we have not traced any reported decision involving an arrestment in rem of freight in order to make good a maritime lien encumbering the freight.

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1 (1885) 12 R. 1090.

3.43 This raises the question of how a lien against freight is to be enforced. The answer seems to be by the indirect means of an arrestment in rem against the ship or cargo, following English Admiralty practice.[1] Thus the English Rules of the Supreme Court, Order 75, rule 10(5) provide that "a warrant of arrest issued against freight may be executed by serving the warrant on the cargo in respect of which the freight is payable or on the ship in which that cargo was carried or on both of them".[2] There is, however, no corresponding provision in the Rules of the Court of Session. A maritime lien on freight is accessory to a lien on the ship: thus where there is no lien on the ship, there can be no lien on freight in respect of the same debt.[3] Presumably the right to arrest in rem the cargo will normally suffice to require the cargo-owner to consign the freight into court,[4] and it seems that in English practice either the freight is paid into court or security for the amount of the freight is given.

3.44 We invite views on whether any provision is necessary or desirable to amend or clarify the procedure for enforcing a maritime lien against freight. The source of the rule of English Admiralty law that a lien against freight is enforced indirectly by

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[1] See Encyclopaedia of Scottish Legal Styles, vol 8 (1938) p 392, fn 4; Maxwell, Practice of the Court of Session (1980) p 387.

[2] See also RSC, Order 75, rule 8(1)(a) which provides that a writ by which an action in rem is begun must be served on the property against which the action is brought except (inter alia) where the property is freight, in which case it must be served on the cargo in respect of which the freight is payable or the ship in which that cargo was carried.

[3] The Castlegate [1893] AC 38; Smith v Plummer (1818) 1 B and Ald 575, at pp 582, 583.

[4] Cf The Ringclove (1858) Swa. 310 at p 312 per Dr Lushington; The Flora (1866) LR 1 A and E 45; McMillan pp 176-177.

arrest of the ship or cargo may flow from the fact that arrest in England is not available against a pecuniary debt: a garnishee order is the nearest equivalent. But in Scotland arrestments of money in common form are familiar and it would be legislatively possible to enact a procedure for arresting freight "in rem" in the hands of the person liable to pay it. By an "arrestment in rem" in this context we mean an arrestment having priority over other diligences such as ordinary arrestments in common form, executed after the date when the lien arose. It is conceded however that the priority would be difficult to regulate in a manner which precisely reflected the priority of a lien over a ship and cargo. Such an arrestment could not of course be followed up by sale. Instead the pursuer would apply to the court for an order requiring the arrestee to consign the freight in court. The arrestee liable to account for the freight would have an opportunity to oppose the application. The freight would then be available for satisfying the debt secured by the maritime lien. We seek views on this matter. We acknowledge that Scots Admiralty law should so far as practicable be the same as English Admiralty law, but there seems no reason why there should not be cross-border differences in procedure.[1]

3.45 We note that in "The Castlegate"[2] two of the judges in the House of Lords[3] took the view that in equity it should be competent to enforce a maritime lien against freight even if the lien was not enforceable against the ship. We seek views on whether such a rule should be introduced in Scots law. Although this would introduce a difference from English Admiralty law, the difference would be minor.

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[1] See Sheaf Steamship Co v Compania Transmediterranea 1930 SC 660.

[2] [1893] AC 38.

[3] Ibid at p 48 per Lord Herschell LC and at p 54 per Lord Watson.

3.46 Warrant to arrest in rem to be a legal right or discretionary remedy? The question arises whether warrant to arrest in rem a ship or cargo to enforce a maritime lien should be a matter of legal right, as under the present law, or of judicial discretion on the lines proposed in Part II above. The analogy with the English law on arrests in rem does not point clearly to either solution since, while the English High Court does have a discretion to refuse to issue, or to give effect to, a warrant to arrest in rem,[1] we understand that that power is generally exercised on some legal ground (eg. the incompetence of the application or a procedural defect) and that it is relatively unusual that the opportunity will arise for the exercise of a true discretion, eg. on questions of public policy or public safety such as whether warrant should be issued for the arrest of a ship carrying very dangerous noxious waste, or a ship on passage at sea. Normally the Admiralty Marshal or his deputy (who are not judicial officers) disposes of applications for warrant to arrest.[2] Generally it is only if the Admiralty Marshal is minded to refuse the application that it will come before a registrar or a High Court judge. Further, the Admiralty Marshal may, before giving effect to a warrant for arrest, seek directions from a High Court judge.

3.47 The fact that, in an Admiralty arrestment, the thing arrested is a ship or her cargo may be thought to raise special considerations which we consider later in the context of an Admiralty arrestment on the dependence of ships. Here we are only concerned with arrestments in rem. In their case, the object

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[1] The Andria now renamed the Vasso [1984] 1 QB 477 (CA) at p 489 per Robert Goff LJ.

[2] See RSC, Order 75, rule 5 for the procedure.

of the diligence is to make good a pre-existing maritime lien which is a security right. A judicial discretion to grant or refuse warrant, while it may be appropriate in diligences enforcing unsecured debts, is arguably inappropriate in principle where the diligence enforces a security. We acknowledge that in legislation on the enforcement of consumer credit securities, in the Consumer Credit Act 1974 and earlier hire-purchase legislation, there are precedents for judicial discretionary powers. Maritime liens however involve commercial and Admiralty law and practice and on balance we suggest that a discretion would be out-of-place.

3.48 We propose:

(1) Warrants for arrestment in rem of ships and other maritime property in Admiralty actions in rem enforcing maritime liens should continue to be available to pursuers as of right at the stage of signeting the summons by which the action is begun.

(2) It is suggested that provision should be made by act of sederunt to enable the court, in an Admiralty action in personam, on the application of the pursuer, to grant warrant for an arrestment in rem and orders authorising the pursuer to take steps to convert the action in personam into a combined action in rem and in personam.

(3) Is any legislative provision necessary or desirable to amend or clarify the procedure for enforcing a maritime lien against freight? In particular, should it be competent for the pursuer in an action in rem enforcing a lien encumbering freight to arrest in rem the freight in the hands of the person liable to pay the freight?

(4) **Should a maritime lien encumbering freight be enforceable against freight though not enforceable against the ship?**

(Proposition 30).

(b) Arrestment in rem under Administration of Justice Act 1956, s. 47(3)(b) securing non-pecuniary claim

3.49 Section 47(3)(b) of the Administration of Justice Act 1956 makes it competent to use an arrestment in rem of a ship to secure a non-pecuniary claim (such as a conclusion for specific implement of an obligation ad factum praestandum) of a kind mentioned in paras (p) to (s) of s. 47(2), whether or not the claimant is entitled to a lien over the ship. These paragraphs are as follows:

> "(p) any dispute as to the ownership or right to possession of any ship or as to the ownership of any share in a ship;
>
> (q) any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;
>
> (r) the mortgage or hypothecation of any ship or any share in a ship;
>
> (s) any forfeiture or condemnation of any ship, or of goods which are being, or have been, carried, or have been attempted to be carried, in any ship, or for the restoration of a ship or any such goods after seizure".

It will be seen that these paragraphs relate to an interest in a ship or other property. It is not competent, in terms of s. 47(3), to arrest in rem under s. 47(3) any ship other than the ship to which the claim relates. Section 47(5) provides that a warrant for arrestment of a ship in rem under s. 47(3), in a case where the person in whose favour it is issued is not entitled to a lien

over the ship, shall have effect as authority for detention of the ship as security for the implementation of the decree of the court so far as it affects that ship. The court may, on the application of any person having an interest, recall the arrestment if satisfied that sufficient bail or other security for implementation of the decree has been found (s. 47(3), proviso).

3.50 It has been suggested that an arrestment in rem under s. 47(3)(b) of a ship may be used whether or not the ship still belongs to the defender.[1]

> "For example, under [s. 47 (2)(p)] an owner may wish to obtain possession of a ship which he has chartered to the defender. He would be entitled to arrest his own ship in security of the claim to obtain possession because, for example, of a breach by the defender of a material obligation in the charter".[2]

We respectfully agree that this result seems to flow from the wording of s. 47(3).

3.51 An arrestment in rem under s. 47(3)(b) not enforcing a maritime lien is distinctive in several respects. The right which such an arrestment creates has been called a "quasi-lien".[3] First, it is a unique example in Scots law of an arrestment which secures a non-pecuniary claim. Second, it is the only example in Scots law of an arrestment which is neither an arrestment in common form on the dependence nor an arrestment in rem enforcing a maritime lien. It bears some resemblance to statutory rights under English law to arrest ships in rem in Admiralty

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[1] Inglis, p 87. The learned author observes that the wording of s. 47(3) is by no means clear and there have not yet been any reported cases in Scotland arising from it.

[2] Inglis, p 87.

[3] Inglis, pp 86-87.

actions not enforcing 'proper' maritime liens. Third, although it is an arrestment in rem, it is thought that it is competent in Admiralty actions in personam (whether or not combined with actions in rem) but not in actions which are purely Admiralty actions in rem. A Scottish Admiralty action in rem is designed to obtain (1) a declarator of a maritime lien; (2) a warrant for sale of the ship or cargo encumbered by the lien and its conveyance free of all encumbrances; and (3) satisfaction of the pecuniary debt secured by the lien out of the proceeds of sale.[1] By contrast, an arrestment in rem under s. 47(3)(b) secures a non-pecuniary decree, such as a decree of specific implement enforcing an obligation ad factum praestandum, the most obvious example being an obligation to deliver or give possession of a ship to the pursuer. There is no pecuniary debt, no declarator of a lien, and no sale. An action for such a claim must therefore be an Admiralty action in personam with different incidents and effects from an action in rem. We note however that the Rules of the Court of Session, eg. RC 140(a) and (d) appear to presuppose that an arrestment in rem in an Admiralty action will be used only in an action in rem. We think that, having regard to s. 47(3) of the 1956 Act, this apparent assumption is incorrect in principle. There may be cases where the action in personam for specific implement or ad factum praestandum in which an arrestment in rem under s. 47(3) has been used concludes in the alternative for damages. Here we think that an arrestment on the dependence, rather than an arrestment in rem, is, as it ought to be, the appropriate diligence to secure the damages claim. Fourth, an arrestment in rem under s. 47(3)(b) is not followed by a process of sale but merely secures implementation of the decree. Fifth, an arrestment on the dependence creates a preference for the arrester which will be recognised and enforced

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[1] See especially RC 143; and RC, Appendix, Form 2(9) (form of conclusion in Admiralty action in rem).

in subsequent rankings of creditors. Maritime liens have their own rules of ranking, including the rule that certain liens rank inter se in inverse order of attachment.[1] By contrast an arrestment in rem under section 47(3) does not appear to have any effect on the ranking of creditors, or in competitions with bona fide purchasers or mortgagees, or generally on the substantive rights of parties, other than rights to interim possession.

3.52 It seems to follow that an arrestment in rem under s.47(3)(b) is simply a special statutory procedure in an action in personam for a non-pecuniary decree by which a ship may be fixed in the place where it is arrested and brought within the control of the court,[2] and an indirect means of obtaining monetary security for implementation of a non-pecuniary obligation as a condition of recall. In some respects, its nearest analogue in Scots law is an order by the Court of Session regulating interim possession pendente lite under section 47(2) of the Court of Session Act 1988,[3] or an order by the Court of Session or sheriff for the preservation, custody and detention of property under

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[1] Thomas, pp 235 - 237; The Lyrma (No 2) [1978] 2 Lloyd's Rep 30.

[2] Breach of the arrestment would be punishable as a contempt of court: cf. Inglis and Bow v Smith and Aikman (1867) 5 M 320.

[3] This re-enacts part of section 6(7) of the Administration of Justice (Scotland) Act 1933. It provides: "In any cause in dependence before the Court, the Court may, on the motion of any party to the cause, make such order regarding the interim possession of any property to which the cause relates, or regarding the subject matter of the cause, as the Court thinks fit" The "Court" here means the Court of Session (1988 Act, s 51).

section 1 of the Administration of Justice (Scotland) Act 1972.[1] The advantage of using the concept of arrestment is presumably that it attracts useful rules on the mode of execution of the diligence, the duties of the defender and the availability of ancillary warrants to dismantle and warrants to bring into safe harbour.

3.53 The analogy of the court's existing powers to regulate interim possession pendente lite suggest that the court should have a general discretion to grant, or to refuse to grant, warrant to arrest in rem under s. 47(3)(b) of the 1956 Act. Since however speed is often essential in diligence against ships, we suggest that a pursuer should be entitled, at his option, to obtain warrant to arrest in rem under s. 47(3)(b) without applying to the court but, in that case, he would be liable in damages if he failed to obtain the decree ad factum praestandum which the arrestment in rem was designed to secure.

3.54 We propose:

(1) **Where in proceedings having a non-pecuniary conclusion for enforcement of a claim mentioned in paras (p) to (s) of section 47(2) of the Administration of Justice Act 1956 in which the claimant is not entitled to a maritime lien over the ship concerned:**

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[1] This relates to property which appears "to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought". It is not confined to the recovery of property which may be produced in evidence at a proof.

(a) the claimant executes an arrestment in rem of the ship under section 47(3)(b) of that Act; and

(b) the warrant to arrest in rem was granted by a clerk of court in the ordinary course of process and not by a Lord Ordinary or sheriff in the exercise of a discretion such as we mention in para (2) of this Proposition,

then the claimant should be liable in damages for wrongful diligence if he fails to obtain the decree whose implementation the arrestment in rem secures.

(2) In such proceedings, the court should have a discretionary power, exercisable on the claimant's application, to grant warrant for an arrestment in rem of the type mentioned in section 47(3)(b) of the 1956 Act. Where the claimant then executes the arrestment competently and in a formally regular manner but thereafter fails to obtain the decree whose implementation the arrestment in rem was intended to secure, he should be liable in damages for wrongful diligence if the court was misled into granting the warrant by either:

(a) a material factual statement by the claimant which he knew or ought to have known was untrue; or

(b) the claimant's failure to disclose to the court material facts within his knowledge.

(Proposition 31).

(c) Diligence on the dependence of actions in personam.

3.55 Arrestment in common form is competent on the dependence of an Admiralty action in personam, subject to certain restrictions regarding arrestment of ships under the 1956 Act, s. 47. The position is summarised in the following paragraphs.

3.56 Under s. 47(3)(a) of the 1956 Act, arrestment in common form of a ship is competent on the dependence (of an Admiralty action in personam) containing a pecuniary conclusion appropriate for the enforcement of any claim of a type specified in paras. (p) to (s) of s. 47(2) if the ship is the ship to which the pecuniary conclusion of the action relates.

3.57 Claims specified in Administration of Justice Act 1956, s. 47(2)(p) to (s). Paras. (p) to (s) of s. 47(2) are described at para.3.49 above. The conditions of competence of arrestment on the dependence imposed by section 47(3)(a) differ from the conditions of competence laid down in s. 47(1) (which also bears to apply inter alia to paras. (p) to (s) of s. 47(2) but since s.47(1) is expressed to be "subject to" s. 47(3), s. 47(3) rules in the event of any conflict between s. 47(1) and s. 47(3)). In s. 47(3)(a), no mention is made of an arrestment on the dependence of a share, or shares, in a ship. Yet it is clear that in a claim of a type mentioned in paras. (p) to (s) of s. 47(2), the defender may be the owner of only one share, or only some of the 64 shares, in a ship. Accordingly, on a literal interpretation of s. 47(3)(a), where the defender is or claims to be the owner of only one share in a ship, the whole ship may be arrested on the dependence (and by necessary inference, sold in a process of sale). This may have been a drafting error, and we suggest that section 47(3)(a) should

be amended so as to refer to a share in a ship, as well as to a ship.

3.58 Claims specified in s. 47(2) (a) to (o). Under s. 47(1) of the 1956 Act, a warrant for arrestment in common form of "property" on the dependence (of an Admiralty action in personam) is authority for the detention of the ship only if the conclusion in respect of which the warrant is issued is appropriate for the enforcement of a claim specified in s. 47(2) paras (a) to (o),[1] and either (a) the ship is the ship with which the action is concerned or (b) all the shares in the ship are owned by the defender.

3.59 This important provision restricts the types of case in which an arrestment of a ship or cargo on the dependence were competent at common law. It seems clear that section 47(1) was not intended to replace certain relevant common law rules. Thus, though section 47(1) refers to an arrestment of "property", this must have reference to an arrestment of a ship, or a share in a ship, or her apparel, or her cargo,[2] which alone at common law provide authority for detaining a ship.

3.60 The same: ship partly owned by defender. It seems clear also that section 47(1) has reference to a ship or a share in a ship belonging to the defender at the time of execution of the arrestment. This point is especially important in relation to a ship partly owned by the defender. Thus section 47(1) provides that an arrestment on the dependence of a ship etc. is incompetent "unless either - (a) the ship is the ship with which

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[1] Section 47(1) refers also to claims specified in s. 47(2) paras. (p) to (s), as discussed in para. 3.57 above.

[2] We revert to cargo on board ship at para 3.78 ff below.

the action is concerned, or (b) all the shares in the ship are owned by the defender". As a recent commentator[1] observes:

> "If section 47(1)(a) is read literally and in isolation from the common law position it would allow a ship to be arrested if it did not belong to the defender at all just because it was the ship with which the action was concerned. This would give the status of a maritime lien to every claim encountered in s. 47(2) which would be an absurd result".

It seems clear therefore that section 47(1)(a) has reference to a ship partly owned by the defender at the time of execution of the arrestment.[2]

3.61 The same: arrestment of "sister ships". Before the Administration of Justice Act 1956, s. 47, came into operation, there was no formal limit on the number of ships owned by the defender which could be competently arrested on the dependence of an action for payment.[3] It is however not altogether clear how far s. 47(1) has limited that right.[4] Section 47(1) provides in effect that it is not competent to arrest a ship "unless either (a) the ship is the ship with which the action is concerned, or (b) all the shares in the ship are owned by the defender..." (emphasis added). If no questions of cross-border or international harmonisation arose, the provision would probably be construed as not limiting the number of ships which might be arrested, provided they complied with either para. (a) or para. (b). It is however permissible and perhaps necessary to refer to the Brussels Convention relating to the Arrest of Seagoing Ships of May 10, 1952 as an aid to construction and the provisions of the

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[1] Inglis, p 88.

[2] See eg William Batey & Co Exports Ltd v Kent 1985 SLT 490, aff'd 1987 SLT 557.

[3] In Sheaf Steamship Company v Compania Transmediterranea 1930 SC 660, the Court of Session held that while Scots Admiralty law may be the same as English Admiralty law, the law on remedies and procedure was not the same, and that an arrestment to found jurisdiction could be laid against a sister-ship of a wrong-doing ship, though an arrest of the sister-ship would have been incompetent under English Admiralty law. The same reasoning must have applied to arrestment on the dependence.

[4] See Inglis, p 88.

Convention, especially article 3(3)[1] makes it clear that only one ship belonging to the defender may be arrested for the same debt. Moreover, this result was reached in England by the Court of Appeal in The Banco[2] on the construction of similar legislation. It is true that the common law of England did not allow even one ship to be arrested unless it was the ship with which the action was concerned, and never allowed two or more ships to be arrested for the same debt. But in The Banco the Court of Appeal relied heavily on the Brussels Convention. Moreover it has been held in a Scottish case in the House of Lords that "while some divergence from the provisions of the 1952 Convention can be seen both in the provisions of the Act of 1956 relating to England and those relating to Scotland, it is desirable that such provisions for both jurisdictions as can be identified as having a common derivation from particular provisions of the Convention should be interpreted alike in each of these jurisdictions, if that can be done without undue straining of language".[3] It has however been argued that the 1956 Act did not remove the existing Scottish right to arrest more than one ship on the

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[1] Article 3(3) provides (inter alia): "if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside".

[2] [1971] P 137. Statutory effect was given to this decision by subsection (8) of section 21 of the Supreme Court Act 1981.

[3] Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68(HL) at p 73 per Lord Keith of Kinkel.

dependence of an in personam action.[1]

3.62 This is not a matter on which the Act should or need leave any doubt, and we think that section 47 should be clarified. We take the policy to have been settled by the Brussels Convention, and that the Act should give effect to that policy. The change, if it be a change, would not be so wide-ranging in its effects as might be thought since we understand that shipping companies nowadays normally own only one ship.[2] It should be competent to obtain a warrant for arrestment which does not specify a particular ship, or which specifies more than one ship, but it should be competent to arrest only one ship in pursuance of the warrant.

3.63 Definition in s. 47(2) of claims for which arrestment on dependence competent. The definition in section 47(2) of the 1956 Act of the claims which may be secured by an arrestment on the dependence, and the analogous provisions in the corresponding English legislation, have been litigated in a number of reported cases.[3] A review of section 47(2) is beyond the scope of this Discussion Paper.

3.64 We propose:

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[1] See Inglis, p 88.

[2] "An important exception to this is, of course, the national fleets of countries such as Russia, China, India and Cuba which nowadays make up a significant proportion of the world's fleets": J A G Lowe, "Arrest of Ships and Jurisdiction", p 7, in Law Society of Scotland, Papers for Post Qualifying Legal Education Seminar on Maritime Law (1989).

[3] For a survey of the cases, see Inglis, pp 79-85.

(1) The Administration of Justice Act 1956, s. 47(3)(a), (which provides for the arrestment of a ship on the dependence of an action to enforce a claim specified in paras. (p) to (s) of s. 47(2) of that Act), should be amended so that the reference to a ship includes a reference to a share in a ship.

(2) The 1956 Act, section 47(1)(a) (which makes it competent to arrest in certain circumstances a ship on the dependence if it is the ship with which the depending action is concerned) should be amended to make it clear that the arrestment is competent only if the defender is the owner of a share in the ship at the time of the execution of the arrestment.

(3) The 1956 Act, s. 47(1)(b) (which makes it competent to arrest on the dependence a ship where all the shares in the ship are owned by the defender) should be amended to make it clear that not more than one ship may be arrested to secure the same debt.

(Proposition 32)

3.65 Diligence against non-maritime property on dependence of Admiralty actions in personam. It seems competent for a warrant for arrestment in common form of property, other than a ship or her cargo, to be granted on the dependence of an Admiralty action in personam and also for a warrant for inhibition on the dependence to be granted.

3.66 There is nothing in the Rules of the Court of Session to disapply the ordinary rules on the grant of warrants for diligence on the dependence, and indeed the Rules seem to allow such warrants,[1] though we understand that the use of diligence against subjects other than a ship or her apparel or cargo is unusual on the dependence of an Admiralty action.

3.67 Arrestment of ship on dependence as legal right or discretionary remedy. We suggest that the solution outlined in Part II for the discretionary grant of warrants of arrestments on the dependence of non-maritime property would be appropriate for arrestments of ships and their apparel and cargo on the dependence of Admiralty actions in personam.[2] It may be argued that, in the case of arrestments of ships, speed is often essential, and in some cases the delay caused by an application to the court, even if it takes only a few hours more than the signeting of a summons, may be fatal. This may suggest that the right to arrest should not always be subject to a judicial discretion.

3.68 On the other hand, it is necessary to look at the arrestment of ships from the defender's standpoint as well as the pursuer's. An arrestment of a ship on the eve of its sailing can have very damaging economic consequences for defenders and third parties. There is some indication that the law on the recall of arrestments of ships is more favourable to defenders than in the case of arrestments of other types of property. Thus it has been said that "security will be more readily modified or dispensed with

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[1] See RC 139, and RC, Appendix, Form 14 as read with Form 1.

[2] See Propositions 2 (para 2.69); 3 (para 2.79); 4 (para 2.90); 5 (para 2.92); 6(para 2.101); and 7(para 2.105).

than in the use of other subjects, and the ordinary rule of in dubio requiring caution will not necessarily be followed".[1] This suggests that the reformed law of arrestments of maritime subjects on the dependence should be at least as favourable to defenders as in the case of arrestments of non-maritime subjects. Moreover, funds in a Scottish bank can be transferred to a foreign bank account just as quickly as a ship can be moved. For these reasons, it is doubtful whether the automatic grant of warrant for arrestment on the dependence is any more justifiable in the case of ships than in the case of funds in a bank.

3.69 If, however, the arrestment on the dependence of ships or their cargo is to be regarded as a special case in which speed is arguably more often essential than in most other arrestments on the dependence, then it would be possible to apply the third option outlined in Part II to their case alone. In other words, a pursuer in an Admiralty action in personam would have the right to elect between (a) obtaining a warrant from a clerk of court in the ordinary course of process and incur the risk of strict liability for wrongful diligence is his action is unsuccessful, and (b) making a special application to a Lord Ordinary or sheriff for the discretionary grant of warrant and incur liability for diligence regularly executed only if he has misled the court into granting the warrant. Our preference, however, is for the discretionary judicial grant of warrant.

3.70 We propose:

If our proposal in Proposition 2 (para. 2.69) for introducing the discretionary judicial grant of warrant for diligence on the dependence is accepted, then the same solution should

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[1] McMillan, pp 71-72.

apply in relation to the grant of a warrant for arrestment of a ship or her cargo on the dependence of an Admiralty action in personam. Propositions 3 at para. 2.79; 4 at para. 2.90; 5 at para. 2.92; 6 at para. 2.101; and 7 at para. 2.105, should apply accordingly.

(Proposition 33).

(d) Ancillary warrants and orders

3.71 Warrant to dismantle. An arrestment on the dependence or in rem (which cannot be competently executed while the ship is on passage [1]) fixes a ship in the place in which she is found,[2] and to make sure that the ship is not moved, the pursuer may obtain a warrant to dismantle, (ie. by removing a necessary part of the machinery of a power-driven vessel, or the sails and rudder of a sailing ship).[3] In the Court of Session, it is competent to obtain a warrant to dismantle the vessel, specified in the warrant for arrestment on the dependence, by inserting the form of warrant to dismantle in the signeted summons.[4] If the summons contains a simple warrant for arrestment on the dependence and it is desired to obtain a warrant to dismantle, it was at one time necessary to apply to the Lord Ordinary on the Bills,[5] and later to his

[1] Carlberg v Borjesson (1877) 5 R 188; aff'd 5 R (HL) 215; and see also Administration of Justice Act 1956, s. 47(6), which provides that nothing in s 47 authorises the arrestment of a ship while she is on passage.

[2] See para 3.5, head (b), above.

[3] McMillan pp 58, 68; Inglis, p 91.

[4] RC74, Appendix Form 1; Graham Stewart, p 24.

[5] Graham Stewart, p 24.

[6] Codifying Act of Sederunt, 1913, r E, iii, 1.

clerk,[6] who endorsed the warrant on the signeted summons.[1] We are informed that in current practice the application is made by motion. In the sheriff court, a warrant to dismantle inserted in an ordinary cause initial writ must be signed by the sheriff, rather than the sheriff clerk.[2] While it is clear that a warrant in a summary cause summons for arrestment on the dependence would authorise the arrestment of ships, it is not clear whether a warrant to dismantle can be competently granted at the same time,[3] though no doubt, if it is competent, the warrant should be signed by the sheriff rather than the sheriff clerk who should refuse to sign it.[4] A separate application for warrant to dismantle, commenced by initial writ, is competent,[5] and probably ought to be used in all sheriff court cases except where warrant to dismantle is inserted in an ordinary cause initial writ.

3.72 Dismantling is normally effected by a suitably qualified person, such as a marine engineer, under the superintendence of the messenger-at-arms or sheriff officer executing the warrant to dismantle, and if the vessel is lying in an exposed anchorage, that person is normally on call to facilitate moving the ship where necessary.[6] It has been observed[7] that "in practice the execution of dismantling, which may be a difficult and expensive operation, is seldom found to be necessary. It is the duty of the officer of customs, on exhibition to him of the warrant of arrestment, to

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[1] McMillan, pp 58. This stated "The Lords grant warrant to dismantle [arrested vessels], the same being in safe harbour".

[2] OCR r 8(2); cf r 8(1).

[3] SCR, r 1 Form B.

[4] SCR, r 3.

[5] See eg Encyclopaedia of Scottish Legal Styles, vol 1, p 306.

[6] Inglis, p 91.

[7] McMillan, p 68.

withhold [the ship's] clearance, without which she is unable to sail, and her detention is thus in effect secured without the necessity of dismantling".

3.73 Warrant to bring into harbour. An arrestment may be executed on a ship when it is in a safe harbour or at an anchorage in a roadstead in which the arrestment can be executed safely.[1] An arrestment fixes the ship in the place where the arrestment is executed, and that may not be a safe place for a permanent anchorage or for dismantling. Neither a warrant to arrest nor a warrant to dismantle carries with it authority to bring a vessel into a safe harbour and for that a separate warrant on a special application to the court is needed.[2] In the Court of Session, the application may be by incidental motion in the depending action.[3] In the sheriff court no authority sanctioning an incidental motion has been traced, but a common law summary application commenced by initial writ is competent.[4] The warrant is competent in circumstances where the ship is lying at anchorage at a roadstead.

3.74 Other ancillary orders. It has been observed that the "court has a wide discretion to make whatever orders that seem to it appropriate with regard to the movement of a vessel which has been arrested, particularly where her continued presence at a jetty or quay is causing loss and damage to an innocent third

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1 McMillan, pp 65-66.

2 "The Grey Dolphin" 1982 SC 5: the motion is presumably ex parte.

3 See eg Turner v Galway (1882) 19 SL Rep 892.

4 Encyclopaedia of Scottish Legal Styles, vol 1, pp 306-307; see also Turner v Galway (1882) 19 SL Rep 892 at p 893 per Lord Shand.

5 Inglis, pp 91-92; see Svenska Petroleum AB v HOR Ltd 1982 SLT 343 discussed at paras. 2.237 and 3.73.

party".[5] These powers include powers empowering cargo owners, who have arrested a vessel whose owners refuse to bring the ship into harbour for unloading, to board the vessel and bring it into harbour, and also orders enabling the cargo owners to open the hatches and discharge the cargo.[1] They also include powers to authorise the movement of a ship to a harbour where it may be conveniently sold, and a condition requiring that the ship be insured.[2] Such powers are only invoked in the absence of agreement between the parties, and appear to be amply sufficient to meet any contingency which is likely to arise, except possibly recovery of an arrested ship which has sailed in breach of arrestment.

3.75 Warrant to take possession of arrested ship at sea? There is obiter authority that it is competent at common law to obtain warrant to take possession of or seize a ship on passage where the ship has already been arrested and has sailed in breach of the arrestment, provided the ship is still within the jurisdiction.[3] This however has been doubted in an Outer House case in which it was also observed that if it were indeed competent to seize an arrested vessel at sea, it would be an order which the Court would be most reluctant to grant in view of the risk to life and property which would be involved.[4]

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[1] Inglis, p 91 giving the facts of an unreported case.

[2] Brodersen, Vaughan and Co. v Falcks Rederi A/S (1921) 1 SLT 60.

[3] Carlberg v Borjesson (1877) 5 R 188 at p 194, per Lord Mure, p 195 per Lord Shand; aff'd on another point (1878) 5 R (HL) 215; Graham Stewart, p 42; McMillan, p 67.

[4] "The Grey Dolphin" 1982 SC 5 at p 7 per Lord Wylie.

3.76 Is reform necessary? We are not aware of any need to change the existing law on warrants to dismantle and warrants to bring ships into harbour and other ancillary orders which the court may make to regulate the movement of an arrested ship and related matters, such as discharge of cargo. We doubt whether there is any need to clarify the law on warrants to take possession of arrested ships at sea, where the ships have sailed in breach of an arrestment. There is authority that a breach of arrestment is a contempt of court punishable by fine or imprisonment[1] and no doubt by other sanctions[2] These include an order that the defender may insist in his defence only on condition of finding caution or making consignation.[3] It may be that the procedure by way of a petition and complaint for contempt would normally suffice. We understand that in England, the Admiralty Marshal would in such cases rely on sanctions for contempt rather than recovery of a vessel at sea by force. We understand that the Admiralty Marshal invokes the aid of local customs officers throughout the jurisdiction and requests that he be informed if a ship, which has been removed from the jurisdiction in breach of an arrest, returns to the jurisdiction. He will then re-arrest it. It may be that similar arrangements enabling the Scottish courts to be informed if a ship in breach of arrestment returns to Scotland could be made by administrative action without the need for legislation. On the whole, we think that the court has the power to develop remedies to make an arrestment against ships effective by measures which are acceptable socially and otherwise, and that legislation is unnecessary. We seek views however.

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[1] Graham Stewart, pp 222; and see Inglis & Bow v. Smith & Aikman (1867) 5 M 320.

[2] Eg sequestration of property: cf Edgar v Fisher's Trs (1893) 21 R 59.

[3] Meron v Umland (1896) 3 SLT 286 (removal of ship outside Scotland in breach of arrestment).

3.77

Is there a need for legislation to clarify the law on the competence of warrants to take possession of ships which have sailed in breach of arrestment or to improve the sanctions for breach of arrestment in such cases?

(Proposition 34).

(e)Arrestment of cargo on board ship

3.78 The law on the arrestment of cargo on board a ship resembles the law on arrestment of ships in some respects and differs in other respects. There is no comprehensive Institutional or judicial analysis of this matter and the law is to some extent uncertain. The brief treatment of the law in the Institutional writers assimilated arrestment of cargo to arrestments of ships.[1] It may be that the common law has changed since the Institutional period which may be taken as ending about the time (1830) when Admiralty jurisdiction was transferred to the Court of Session and sheriff courts.[2] Thus McMillan remarks:

> "Except where arrestment in rem is used, there is no distinction in principle between the arrestment of goods at sea and on land. The arrestment of a ship does not necessarily arrest her cargo and imposes no nexus on the cargo except insofar as practical difficulty may be experienced in discharging it from the arrested vessel. Formerly the arrestment of cargo was an Admiralty

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[1] Bankton IV, 41, 9; Baron Hume's Lectures, vol 6, pp 94-95, Bell Commentaries vol 2, p 60.

[2] Court of Session Act 1830, ss 21-23. The fifth and last personal edition of Bell's Commentaries was published in 1826.

process for which the concurrence of the Judge Admiral was necessary but since the abolition of the Admiralty Court this distinction between arrestments of goods at sea and on land no longer holds".[1]

There are however some important differences in the modern law between arrestments of cargo on a ship and arrestments of goods on land since, for example, it is thought that goods on board ship may be arrested in the hands of the owner of the goods, which is incompetent in the case of goods on land. Section 23 of the Court of Session Act 1830 provided that "the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty,and all regulations relative thereto, may be enforced in" the Court of Session and sheriff court. This language does not suggest that the transfer of Admiralty jurisdiction was intended to change the law on arrestment of cargo on board ship.

3.79 Arrestment, not poinding, competent. The greater weight of authority is to the effect that, in Graham Stewart's words: "ships in the possession of the debtor or his servants, and their cargoes, are arrested not poinded".[2] The primary source of this rule is Bankton,[3] who cites a case[4] which has never been found. The principle underlying the rule as to both ships and cargo was doubted by Bell[5] and Graham Stewart,[6] but Lord Ivory[7]

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1 McMillan, p 62.

2 Graham Stewart, p 105; see also p 344.

3 IV, 41, 9: see also Baron Hume's Lectures, vol 6, pp 94-95; Lord Ivory's Notes to Erskine Institute III, 6, 21, note b; Campbell on Citation (1862) p 225.

4 Cochran (unreported, Feb 6, 1750).

5 In his Commentaries vol 2, p 60. In his Commentaries on Statutes p 16, however, Bell accepts without qualification that "in proceeding to attach a ship, the diligence of arrestment is to be used, not poinding".

6 p 344.

7 Notes to Erskine Institute, III, 6, 21, note b.

and even Graham Stewart[1] state that the rule is universally accepted in practice. So far as ships are concerned, of course the rule is incontestable. So far as cargo is concerned, no authority has been traced in which goods on board ship have been poinded. In Arthur v. Hastie and Jamieson,[2] the opportunity arose to contest an arrestment of cargo on board ship in the hands of the ship's master who was the servant (employee) of the owner of the cargo (and of the ship), but the plea was not advanced despite a very full argument on the defender's behalf. It is thought that, despite Bell's doubts as to the underlying principle, the rule can be taken as correct in law. We do not propose any change in this rule.

3.80 Administration of Justice Act 1956, s 47, inapplicable to arrestments on dependence of cargo on board ship. One question not entirely free from doubt is whether an arrestment of cargo on the dependence of an action is subject to the restrictions imposed by the Administration of Justice Act 1956, s 47. As we have seen, section 47(1) of the 1956 Act provides that "no warrant issued... for the arrest [sic] of property on the dependence of an action or in rem shall have effect as authority for the detention of a ship..." (emphasis added) unless certain conditions are satisfied. At first sight, it might be thought that the reference to "property" includes a reference to cargo on board ship. An arrestment of cargo on board ship, whether in rem or on the dependence, has the effect of detaining the ship temporarily until the cargo is discharged, though it is not clear whether the arrestment immobilises the ship at her anchorage (on analogy of arrestment of the ship herself) or merely prevents her removal from the jurisdiction with her cargo on board (on the analogy of

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1 p 344.

2 (1770) Mor 14209; 2 Paton 251.

3 We revert to this at para 3.91 below.

ordinary arrestments).[3] There is however recent authority which suggests that section 47 of the 1956 Act does not apply to arrestments on the dependence of cargo on board ship. In Svenska Petroleum Co Ltd v. HOR Ltd,[1] the pursuer arrested cargo on board a ship on the dependence of an action of damages for an alleged breach of the defender's contractual obligation to nominate by the due date a tankership to carry a cargo of oil. We understand that the action was not brought as an Admiralty action. No mention was made of the 1956 Act, s 47, in the reports of the case. It is extremely doubtful whether the conditions of s 47 were satisfied. Thus the defenders were not owners of the ship (see s. 47(1)(b)). Moreover the action was primarily concerned not with a ship but with breach by the purchaser of a contract to purchase oil, so that the condition that the ship detained must be the ship with which the action is concerned could not be satisfied (see s 47(1)(a)). Nevertheless the applicants for recall of the arrestment of the cargo did not rely on an argument that the 1956 Act s. 47 applied to an arrestment on the dependence of cargo on board ship and had not been complied with, though a successful argument to that effect was badly needed.[2] The reference to "property" in s. 47(1) may have been intended to apply to the apparel and appurtenances of a ship. As a matter of policy, we think that section 47 of the 1956 Act should not apply to arrestments of cargo on board ship which only have the effect of detaining the ship temporarily until the cargo is discharged. Moreover, we doubt whether the Brussels Convention of 1952,[3](which the 1956 Act, s. 47 implements), was intended to cover arrestments of cargo on board ship temporarily detaining the ship until discharge of the cargo. The main article of the Convention provides that "[a] ship... may be arrested in the jurisdiction of any of the Contracting States in respect of any

[1] 1982 SLT 343; 1983 SLT 493; 1986 SLT 513.

[2] In West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294, which involved an arrestment of cargo on board ship in a dry dock, there was likewise no mention of the requirement of s. 47 of the 1956 Act.

[3] International Convention Relating to the Arrest of Seagoing Ships, signed at Brussels, on May 10, 1952.

maritime claim, but in respect of no other claim".[1] The word "arrest" is defined to mean "the detention of a ship by judicial process to secure a maritime claim...".[2] No mention is made of an arrest of cargo, and while the definition of "arrest" could be widely construed, we doubt whether it was intended to cover an arrestment of cargo which has merely the incidental effect of detaining the ship temporarily pending discharge of the cargo.[3] We therefore suggest that section 47 should be amended to make it clear that the restrictions which it imposes on arrestments of "property" on the dependence of an action do not apply to an arrestment on the dependence of cargo on board a ship. It seems unnecessary to disapply section 47 of the 1956 Act from arrestments in rem of cargo on board ship since it is difficult to conceive of circumstances in which the restrictions in section 47 would render incompetent an arrestment in rem of cargo which is otherwise competent under the general law.[4]

3.81 Mode of execution of arrestment of cargo. The enactments and rules of law govering the mode of execution of arrestment of cargo are somewhat complicated.[5]

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[1] Ibid, article 2.

[2] Ibid, article 1.

[3] This matter may require further exploration. We have examined the "travaux preparatoires" in International Maritime Committee, Bulletin No 105, Naples Conference, 1951 (Antwerp, 1952) which do not mention the present problem. We have not, however, had access to the report of the proceedings of the diplomatic conference of 1952 which led to the Convention.

[4] An arrestment in rem of cargo on board ship can only be executed (1) in connection with an action in rem concerning the ship and her cargo so that s 47(1)(a) would be satisfied and (2) to enforce a maritime lien securing a claim mentioned in para (a), (c), (n) or (o) of s 47(2).

[5] We revert to the question whether edictal service is competent at para 3.86 below.

(i) Arrestment of cargo on board ship on dependence of Admiralty action in personam. Though an arrestment of a ship is executed by an arrestment against the ship herself, (a "real diligence" in a procedural sense), an arrestment on the dependence of goods on board ship (which is regulated by the common law) is not executed by an arrestment "against the goods". There must be an arrestee on whom the schedule of arrestment is served and it is the service on him which constitutes the arrestment.

(ii) Arrestment in rem of cargo on board ship. The mode of execution of an arrestment in rem is regulated by RC 140(a), except in the case of landed or transhipped cargo which is governed by RC 140(b) (see head (iii) below). RC 140(a) is therefore applicable to cargo on board ship as well as to a ship (and possibly freight). Thus an arrestment in rem of cargo on board ship is executed by affixing the arrestment schedule to the mast or other prominent part of the ship. At the same time the messenger delivers "to the master of the ship or other person on board and in charge thereof, or of the cargo, as representing the owners and parties interested, a copy of the schedule and execution". (emphasis added).

(iii) Arrestment in rem of landed or transhipped cargo. RC 140(b) provides as follows:-

"(b) If any cargo has been landed or transhipped or [is] in course of being landed or transhipped, the arrestment of the cargo (but only in so far as it has not been delivered to the owner thereof, or to his agents) shall be effected by the messenger-at-arms placing the schedule of arrestment in the hands of the custodier for the time being of the cargo, or, when such cargo has been landed

on to the quay, or into the shed of any port or harbour authority, by the messenger-at-arms delivering to the harbour-master a schedule of arrestment of the cargo".

An Admiralty arrestment, including an arrestment in rem of cargo on board ship, may be executed in the hands of the owner of the cargo, or of anyone else, because of the rule that the maritime lien travels with the encumbered res into whose hands so ever it comes. RC 140(b) however makes no provision for an arrestment in rem of landed cargo in the hands of the owner or his agents and we propose later that this omission should be rectified.[1]

(iv) Arrestment on the dependence of landed or transhipped cargo. RC 140(b) is not in terms confined to an arrestment in rem, and it is not clear whether it was intended to apply to an arrestment on the dependence. As we indicate below, an arrestment on the dependence is competent to attach goods on board ship in the hands of the owner of the cargo, or a third party (eg the ship master), and under general common law principles is always competent to attach goods in the hands of a third party wherever the cargo is situated within the jurisdiction. Where the cargo is landed and is in the possession of the owner of the cargo, it is outside the common law rule allowing cargo on board ship to be arrested in the owner's possession and there is no authority suggesting that it can be arrested on the dependence at common law. RC 140(b), if applicable to arrestment on the dependence, would not change the common law in this respect.

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[1] See para 3.166 below.

3.82 Who is the proper arrestee? In ordinary arrestments, (ie of subjects other than ships or their cargo), the general rule is that an arrestment is ineffectual against "property in the debtor's own possession or in that of persons who are in law identified with him".[1] The object of this rule is said by Bell[2] to be that otherwise the arrestment "would operate as an inhibition in moveables, without being attended with those requisites of publication which accompany that diligence". The test of whether a person is identified with the debtor is whether the person must deliver the property to the debtor on demand or whether the debtor can only obtain possession by raising an action for delivery.[3] The distinction seems to be more or less the same as that between an employee of the debtor under a contract of service, and an independent contractor under a contract of hire of services. Thus Graham Stewart[4] observes:

> "Arrestable subjects in the possession of a carrier, manufacturer, agent or factor, factor loco absentis, auctioneer, law agent, banker or even a depositary are therefore attachable by arrestment; and a fortiori arrestment is competent in the hands of a trustee... In these cases the arrestee was not the mere servant of the common debtor, but acted under a contract which imposed on him a liability to account".

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[1] Bell, Commentaries, vol 2, p 70; Graham Stewart, pp 107-108.

[2] Commentaries, vol 2, p 70.

[3] Idem; Graham Stewart, pp 107-108. Bell (supra) says: "It seems to be settled that wherever goods are in the hands of another than the owner, upon a contract which, involving mutual obligation, admits of an actio contraria, as meeting an actio directa; which implies, therefore, that the possession cannot legally, without an action, be retained against the consent of him who holds it; then the possession is to be considered as not with the owner".

[4] p 108; footnotes omitted.

The reference to a carrier in this passage is meant to include a carrier of goods by sea since the case cited[1] related to an arrestment of goods of the debtor on board a ship in a harbour by service in the hands of the carrier's manager who had possession and control of the goods. The last sentence in the quoted passage is consonant with the general rule that a liability to account is the proper subject of arrestment.[2]

3.83 A distinction between servants of the defender cargo-owner, and his independent contractors liable to deliver the cargo to him, does not seem to have much relevance to an arrestment of the cargo on board ship since, as we have seen, the rule is that, in Graham Stewart's words, "ships in the possession of the debtor or his servants, or their cargoes, are arrested not poinded".[3] The result of the latter rule seems to be that if the shipmaster is the servant of the defender cargo owner, (eg. because the cargo owner is owner of the ship or a charterer by demise), an arrestment of cargo on board ship under the shipmaster's charge and control may be laid in the shipmaster's hands.[4] If this were not so, there would be no means of attaching cargo on board a ship where the defender cargo owner is also the carrier because poinding of cargo on board ship is incompetent. It is therefore difficult to understand Graham Stewart's remarks[5] that:

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1 Matthew v Fawns (1842) 4 D 1242.

2 Bell, Commentaries, vol 2, p 71.

3 Graham Stewart, p 105 (emphasis added).

4 See Arthur v Hastie and Jamieson (1770) Mor 14209; 2 Paton 251, cited at para 3,80 above.

5 At p 108.

> "An apparent exception to the competency of arresting in the hands of carriers occurs in the case of carriage by sea where the owner of goods has hired the ship on time and it is at his disposal. In such a case the master and crew are the servant of the freighter, and arrestment therefore by his creditor in the hands of the shipmaster is incompetent".

No authority is cited and it is thought that the proposition is incorrect, but it may be that the law should be clarified by statute.

3.84 While no clear principle emerges from the few reported cases, nearly all decided last century, the courts seem to adopt a liberal approach and will generally sustain an arrestment of cargo on board ship if it is laid in the hands of the person having possession and control of the cargo. Cargo on board ship under the charge of the shipmaster may be arrested in the hands of the shipmaster at least if he has assumed or acknowledged custody of the cargo.[1] In one case[2], goods on board ship in a port waiting to be unloaded were arrested in the hands of the manager of the carrier shipping company who had actual charge and custody of the cargo; the validity of the arrestment was not challenged on that ground. In another (Outer House) case,[3] arrestment in the hands of shipbrokers of a cargo of coal was sustained where the vessel was lying in harbour under the sole control of the shipbrokers, was being loaded under their directions and superintendence; and the coal when it was brought alongside was taken possession of and put on board by them, at a time when the master was not on board. The defenders argued that "the arrestment of goods aboard ship could only be in the hands of the owners" (meaning apparently the owners of the ship) "or of the master", and that "Arrestments must be in the hands of principal,

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[1] McDonald and Halket v Wingate (1825) 3 S 494; Kellas v Brown (1856) 18 D 1089; Svenska Petroleum AB v HOR Ltd 1986 SLT 513. McMillan, p 63 states that he must have delivered the bill of lading, but this may only be evidence of actual custody.

[2] Matthew v Fawns (1842) 4 D 1242; explained in Carron Co v Currie & Co (1896) 33 SL Rep 578 at p 581 per Lord Low who states that the session papers in Matthew show that the goods were on board ship when arrested.

[3] Carron Co v Currie & Co (1896) 33 SL Rep 578.

the only exception being the case of the ship captain. Arrestment in the hands of the agent of the debtor of the common debtor is bad".[1] It was held however that as the shipbrokers had the sole and uncontrolled management of the ordinary affairs of the carrier who owned the ship, they were in the position of factors and commissioners (equivalent to principals) rather than agents, and that so long as the ship was in the harbour and taking in cargo, the cargo was in the exclusive control of the shipbrokers. The judgment does seem to have accepted the distinction drawn by Bell [2] between commissioners having general management powers (equivalent to principals) and agents. McMillan, however, uses this case to vouch the proposition that "If the goods have been delivered to the ship-owner, but have not yet been placed on board, arrestment takes place in his hands or in those of his agents. This is contrary to the common law rule that arrestment in the hands of an agent is incompetent, but is sanctioned because of the peculiar position and exceptional powers of ship's husbands".[3] It is thought that the Carron Co case does not support arrestment in the hands of a ship owner's agents.

3.85 It seems to us that the main uncertainty in the present law is the doubt whether it is competent to arrest a cargo on board ship where the cargo is in the possession of the defender or his servants or employees.[4] If this doubt is widely entertained, it should be removed by statute.

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[1] At p 579.

[2] Commentaries, vol 2, p 71.

[3] McMillan, p 63.

[4] See para 3.83 above.

3.86 Edictal service and arrestment of cargo at sea.[1] Although a ship cannot be arrested while she is on passage, there is authority that the cargo of a ship which is at sea or abroad may be competently arrested by edictal service. Thus Bankton, after stating that the judge-admiral's concurrence is required to a warrant of arrestment of goods within his jurisdiction, remarks:

> "if the goods, belonging to persons in this country, are in a ship which is at sea, or abroad, it must be done at the mercat-cross of Edinburgh, pier and shore of Leith, in the hands of the ship master".[2]

Edictal service is now executed by service on the Keeper of Edictal Citations at Edinburgh.[3] By statute[4] arrestment by edictal service does not have the effect of interpelling the arrestee from "paying" to the common debtor, unless it is proved that the arrestee was in knowledge of the arrestment. Presumably "paying" is to be taken as including "delivering" in the case of arrestment of moveables. It is a general rule that an arrestment is only competent if the arrestee is subject to the jurisdiction of the Scottish courts.[5] According to McMillan (1926) in practice edictal arrestment of cargo is unknown.[6]

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1 Carlberg v Borjesson (1877) 5 R 188; aff'd 5 R (HL) 215; Administration of Justice Act 1956, s 47(6).

2 Bankton, IV, 12, 9.

3 Act of Sederunt (Edictal Citations, Commissary Petitions and Petitions of Service) 1971, r 1(2); Debtors (Scotland) Act 1838, s 18.

4 Debts Securities (Scotland) Act 1856, s 1.

5 Graham Stewart, p 37; Brash v Brash 1966 SC 56.

6 McMillan p 63.

3.87 The first question is whether an arrestment can or should be competently executed to attach cargo on a vessel on passage at sea. In Carron Co. v. Currie & Co [1] the shipbroker defender in an action of furthcoming argued that if an arrestment of cargo could be competently laid in the hands of a shipbroker, it would result in this that if a shipbroker had the management of all the liners of some large company,[2] arrestment might be used in his hands of cargo on board any of the ships wherever they might be. Rejecting this contention, Lord Low observed[3] that an arrestment in the hands of a shipbroker would not have been good if the ship had set sail because neither the ship nor the cargo would have been in the charge and custody of the shipbrokers. Yet the shipbrokers had general powers of management of the company which owned the ship (and had not merely supervised the loading) so that the shipmaster must have been subject to their control. Graham Stewart[4] on the other hand remarks that "arrestments used in the hands of the shipowners would attach goods on board their vessels then at sea". The case[5] relied on however related to the arrestment of the share of a partner in a partnership, by service in the hands of the other partners, which was sustained though the moveable assets of the partnership were at sea or abroad at the time of arrestment. It may be that this differs from an arrestment of cargo at sea, since, in an arrestment of a share in a partnership, what is arrested is a species of incorporeal right (which includes a share of the profits of sale of the assets) rather than the assets themselves. In the light of the dicta in the Carron Co. case quoted above, it is thought that an arrestment of cargo on board a vessel at sea in the hands of the owner, or the owner's general managers, would not be effectual, though the matter is not free from doubt.

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1 (1896) 33 SL Rep 578.

2 We understand that companies nowadays normally own only one ship.

3 At p 581.

4 p 108.

5 Rae v Neilson (1742) Mor 716.

3.88 On the duties and rights of the shipmaster or shipowner in the case of an arrestment of cargo at sea, assuming it to be competent, there is only inconclusive sheriff court authority. In Mossgiel SS Co. v. Stewart,[1] an arrestment of goods on board a ship at sea was laid in the hands of a shipping company in Scotland,[2] and the shipping company brought the goods back to Scotland and raised an action of multiple-poinding. While the sheriff held that this was a prudent and proper proceeding in the circumstances, the question whether the shipping company were bound to do so, by virtue of the arrestment, was not clearly determined. The shipping company had other reasons for returning the goods. The company had been interdicted from delivering the bill of lading, and made aware of claims by others to ownership of the goods and of a landlord's hypothec over them. The sheriff allowed the shipping company return freight as recompense for bringing the goods back.

3.89 We seek views on whether the law on the competence of arrestment of cargo on a vessel at sea should be clarified, and in what direction. On the whole we suggest that such an arrestment should not be competent partly because such an arrestment seems exorbitant, and partly because of the practical difficulty of directly enforcing a diligence against corporeal moveables outside Scotland.

3.90 There is a logically separate question of whether it should be competent, or continue to be competent, to execute an arrestment of cargo on board a ship, whether on passage or not, by edictal service. We invite views.

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[1] (1900) 16 Sh Ct Rep 289.

[2] Ibid at p 293.

3.91 Effect of arrestment of cargo in relation to the ship's movement and arrestee's dealings with cargo. One question which the authorities address indirectly, rather than directly, relates to the legal effect of an arrestment of cargo on board ship on the arrestee's right to move the ship with the cargo still on board. Two recent cases throw some light on the matter. Both make it clear that the arrestee is not entitled to remove the ship, with its cargo on board, outside the territorial jurisdiction.

3.92 Thus in Svenska Petroleum AB v. H O R Ltd,[1] a cargo of oil was arrested at Hound Point in the River Forth immediately after loading, in the hands of the ship master, and the owners of the ship and her time charterers applied for recall of the arrestment. Lord Kincraig observed[2]:

> "The interests of the time charterers and owners are in the ship, not the cargo, and in many instances the arrestment of the cargo on board a ship does not effectively prevent the ship from sailing out of the jurisdiction, if the cargo can be discharged and kept in safekeeping. I was informed, and I have no doubt, that in the case of a cargo of oil in a vessel in the Forth, there are no practicable ways by which the arrested oil can be discharged and stored within the jurisdiction, and in that sense, this case can be regarded as exceptional".

The applicants for recall submitted that the arrestment should be "loosed" because of the hardship of maintaining the arrestment until disposal of the action, the loss suffered by the vessel remaining in the Forth, and the danger to the vessel which would arise unless bunkering facilities were provided in the immediate future. Lord Kincraig therefore gave permission for the vessel to

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[1] 1982 SLT 343 (also reported in part 1983 SLT 493).

[2] At p 344.

sail to Southampton, for bunkering purposes, on the understanding that she would be returned to the Forth with her cargo thereafter.

3.93 In West Cumberland Farmers Ltd. v. Director of Agriculture of Sri Lanka,[1] an action of payment against the owners of cargo on board a vessel in dry dock in Dundee, the pursuers arrested the cargo on the dependence. An arrestment by the pursuers of the ship, in a separate action against the ship owners, was recalled.[2] Lord Weir held that "the oppressive effect of maintaining this arrestment [of the cargo] would be to prevent the vessel from leaving Dundee on her contractual voyage",[3] and recalled it. The destination of the contractual voyage was outside the territorial jurisdiction (Sri Lanka).

3.94 In both the Svenska and West Cumberland Farmers cases, however, it is not clear (since it was unnecessary for the court to consider the point) whether the basis of the decision was that:

(1) (on the analogy of an Admiralty arrestment of the ship herself) the arrestment of the cargo immobilised the ship at the place where the arrestment was executed, at least until the cargo was unloaded; or

(2) (on the analogy of an ordinary arrestment of non-maritime moveable goods) the arrestment of the cargo merely prevented the ship-master or owner from parting with the cargo, and from taking it in the ship outside the jurisdiction.

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[1] 1988 SLT 296.

[2] West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294.

[3] 1988 SLT 296 at p 297.

The second of these two possibilities assumes that, in an ordinary arrestment in common form of corporeal moveables, situated within the jurisdiction, the arrestee is impliedly prohibited from moving the goods outside the jurisdiction without the leave of the Court. Apart from the two cases just discussed, which may have been decided on that general basis, we have traced little authority on that point. There are however cases, decided at a period in the development of the law when an arrestment to found jurisdiction was regarded as imposing a temporary nexus on the arrested property (as opposed to the modern theory that such an arrestment is merely an "attestation" of the presence of the goods within the jurisdiction, imposing no nexus, and is not an "attachment"[1]), in which the courts stated that such an arrestment "fixes" the moveable property arrested within the territorial jurisdiction of the court.[2] The apparent implication of these cases is that an arrestment imposing a nexus "fixes" the goods within the jurisdiction unless and until the court grants leave for

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[1] Craig v Brunegaard Kjosterud & Co (1896) 23 R 500 at p 503 per Lord McLaren; approved in Fraser-Johnston Engineering Co v Jeffs 1920 SC 222, at pp 227-228, 230; Agnew v Norwest Construction Co 1935 SC 771 at p 780; Alexander Ward & Co Ltd v Samyang Navigation Co Ltd 1975 SC (HL) 26 at p 54; see also Blade Securities Ltd, Petitioners 1989 SLT 246 at p 247.

[2] See eg McArthur v McArthur (1842) 4 D 354 at p 362 per Lord Fullerton; Lindsay v London N W Railway Co (1860) 22 D 571 at p 585 per Lord President McNeill; Longworth v Hope (1865) 3 M 1049 at p 1055 per Lord Curriehill. Moreover in Trowsdale's Tr v Forcett Railway Co (1870) 9 M 88, Lord Justice Clerk Moncreiff remarked: "It is perfectly true that in point of fact an arrestment ad fundandem does not fix the subject arrested within the jurisdiction, for the arrestee may safely part with it, and it so far differs from an arrestment in execution;..." (emphasis added).

their removal outside the jurisdiction.[1]

3.95 The distinction between the ship-arrestment analogy and the non-maritime-arrestment analogy is important in at least two respects. First, it is important for the construction of the word "detention" in section 47(1) of the Administration of Justice Act 1956.[2] In the case of an arrestment in rem of cargo on board ship, does "detention" mean detention at the place of execution of the arrestment or detention within the territorial jurisdiction? Second, if the ship-arrestment analogy is correct, and the ship is immobilised at least until the cargo is discharged, then it would be competent for the arrester to apply for ancillary warrants to dismantle and to bring into harbour. If the non-maritime-arrestment analogy is correct, then the vessel may sail within Scottish territorial waters and the arrestee may discharge the cargo in Scotland for safe-keeping until such time as it has to be made furthcoming to the pursuer. Ancillary warrants to dismantle, and bring into safe harbour, would not be necessary and might not be competent. This question is bound up with the question whether cargo on board a vessel on passage at sea may be competently arrested because it is clear that, if such an arrestment is competent, the arrestment could not be given the legal effect of immobilising the vessel in the place in which it was when the arrestment was executed. As we have seen, however, there is some doubt whether an arrestment of cargo on a vessel on passage at sea is competent. If arrestment of cargo on board a ship on passage at sea is declared by statute to be

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[1] The nexus subsists after the goods are removed from the jurisdiction (in the absence of recall of the arrestment): McDonald and Halket v Wingate (1825) 3 S 494; Bell, Commentaries on Statutes p 40.

[2] We have proposed at para 3.80 above that it should be made clear by statute that the Administration of Justice Act 1956, s 47, should not apply to arrestments on the dependence of cargo on board ship, but it may continue to apply to arrestments in rem of cargo on board ship.

incompetent, then views are invited on whether an arrestment of the cargo of a ship at a recognised anchorage should until the arrested cargo is unloaded have the same effect in preventing the movement of the ship as an arrestment of the ship herself would have, subject to the powers of the court to grant ancillary warrants and orders as to the dismantling or movement of the ship, and as to the unloading of the cargo.

3.96 We propose:

(1) **No change should be made in the common law rule under which cargo on board a ship may be arrested but cannot be competently poinded.**

(2) **Section 47 of the Administration of Justice Act 1956 should be amended to make it clear that the restrictions which it imposes on property on the dependence of an action do not apply to an arrestment on the dependence of cargo on board a ship.**

(3) **It should be made clear by statute that it is competent to arrest cargo on board a ship where the cargo is in the possession of the defender or his servants or employees.**

(4) **It is suggested that no legislation is necessary to clarify the proper arrestee in whose hands cargo on board a ship should be arrested.**

(5) **It is suggested that it should not be competent to arrest cargo on board a vessel on passage.**

(6) **Should edictal service of an arrestment of cargo on board a vessel be abolished?**

(7) **Should an arrestment of cargo on board a ship, in dry dock or at a recognised anchorage, have, until the arrested cargo is unloaded, the same effect in immobilising the ship as the arrestment of the ship herself would have, subject to the powers of the court to grant ancillary warrants and orders as to the dismantling and movement of the ship, and as to the unloading of the cargo?**

(Proposition 35).

(f) Arrestment of ships and their cargo on Sundays.

3.97 It is a general rule of the common law that arrestments and other forms of diligence cannot be executed on a Sunday.[1] The now abolished diligence of personal arrest of a debtor in pursuance of a fugae warrant was excepted from this rule because it was designed for use against a debtor contemplating flight from the jurisdiction.[2] The court has no power, on application, to grant a special dispensation from the general common law rule.[3] A recent commentator remarks[4] that the prohibition of arrestment of a ship or her cargo on Sundays "can give rise to difficulty nowadays with, for example, tankers or bulk-ore carriers whose turn-round time is very short, particularly as such vessels are frequently discharged over the weekend".

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[1] Graham Stewart, pp 235, 317, 338, 713.

[2] Graham Stewart, p 697. The last vestiges of fugae warrants were abolished by the Debtors (Scotland) Act 1987, Sch 8 para 9 (amendment of Debtors (Scotland) Act 1880).

[3] See Inglis, p 97 who observes "In an unreported hearing in the Svenska v HOR Ltd litigation (1982 SLT 343) an application was made to the court to allow an arrestment on the dependence of an oil cargo to be executed on Sunday but the court declined to pronounce any such order on the basis that it would require an Act of Parliament to change...the existing common law ban...".

[4] Inglis, p 97.

3.98 The rule prohibiting diligence on Sundays dates from a period of Scottish history when sabbatarian principles were very widely observed[1], and when it was natural for the common law to give strict effect to such principles. In particular, it would have been most unlikely that a ship would have been unloaded on a Sunday in seventeenth century Scotland. There may possibly be a case for reviewing the general common law prohibition of diligence on Sunday,though a general abrogation of the prohibition (eg. as to poindings of household goods) would be likely to prove very controversial indeed. We think however that there are good arguments for an abrogation or modification of the rule in relation to an arrestment of ships and their cargoes since, in the nature of their case, speed may often be as essential as it was in the case of fugae warrants under the old law.

3.99 If that is right, the question then arises of whether the rule should be abrogated absolutely so far as it applies to the arrestment of ships or cargo on board ships, or whether the court should be given a discretionary power, on application, to dispense with the prohibition on cause shown. We provisionally prefer the former solution as simpler but invite views.

3.100 We propose:

(1) **The common law rule rendering ineffectual diligence executed on a Sunday should be abrogated or modified insofar as it applies to the arrestment of ships or of cargo on board ships, whether on the dependence, in rem, in execution or to found jurisdiction.**

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[1] See eg Oliphant v Douglas Mor 15002 (establishing the rule in relation to arrestments) which was decided in 1663.

(2) **Views are invited on whether the rule, in its application to ships and cargo on board ships, should be:**

(a) abrogated absolutely; or

(b) retained but subject to a new power of the court to dispense with the rule on cause shown.

We provisionally prefer option (a).

(Proposition 36).

(g) Incidence of liability for expenses of arrestment and sale of a ship and recall of arrestment

3.101 Expenses of arrestment. At common law the expenses of an arrestment on the dependence in common form of a ship follow the ordinary rule discussed above,[1] and were not recoverable as an expense of process since they are not an essential prerequisite of obtaining decree for payment. As we discussed above, they may be recoverable at common law in a subsequent action and, if so, they would be recoverable out of the arrested property under s. 93(2) of the Debtors (Scotland) Act 1987 which provides:

> "Subject to subsection (5) below, any expenses chargeable against the debtor which are incurred in the service of a schedule of arrestment and in an action of furthcoming and sale shall be recoverable from the debtor out of the arrested property; and the court shall grant decree in the action of furthcoming for the payment of the balance of the expenses not so recovered".

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[1] See para 2.117 ff.

This provision applies to arrestment on the dependence in common form of a ship, except that no mention is made of the court granting decree in an action of sale (as distinct from an action of furthcoming) for the payment of the unpaid balance of the expenses. We propose that the same solution should apply as applies to the expenses of arrestments on the dependence of non-maritime subjects as outlined in Part II.[1]

3.102 The expenses of an arrestment in rem to enforce a maritime lien and the expenses of sale (including the expense of moving the ship to the place of sale and of the related insurance premium) are necessary incidents of an action in rem and are therefore recoverable as part of the expenses of process.[2] Section 93(2) of the Debtors (Scotland) Act 1987 is drafted in terms suitable for an action in personam and was not intended to apply to actions in rem, in relation to which s. 93(2) is unnecessary.

3.103 We have traced no direct authority on the incidence of liability for the expenses of an arrestment in rem under s. 47(3)(b) of the Administration of Justice Act 1956. Since such an arrestment is not a necessary step in obtaining decree, the expenses are not recoverable as expenses of process at common law. The nearest analogy is interim measures protecting property pendente lite, eg. interim interdict, in which the award of expenses is discretionary. We suggest that that analogy should be followed.

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[1] Idem.

[2] cf Brodersen, Vaughan and Co v Flacks Rederi A/S (1921) 1 SLT 60; Hatton v A/S Durban Hansen 1919 SC 154.

3.104 Expenses of recall and caution. The general rules applicable to liability for the expenses of recall of an arrestment on the dependence including the expenses of providing caution or a bail bond as well as the expenses of the application, apply to the recall or arrestments of ships whether on the dependence or in rem.[1] These rules have been considered in Part II.[2].

3.105 We propose:

(1) **The rules relating to the expenses of an arrestment on the dependence should apply in relation to the arrestment on the dependence of a ship.**

(2) **The expenses of an arrestment in rem to enforce a maritime lien and the expenses of sale should continue to be recoverable as part of the expenses of the action in rem.**

(3) **The expenses of an arrestment in rem under s. 47(3)(b) of the Administration of Justice ACt 1956 should be discretionary.**

(4) **The rules relating to the expenses of recall or restriction of an arrestment on the dependence should apply in relation to the restriction and recall of an arrestment on the dependence or an arrestment in rem of a ship.**

(Proposition 37).

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[1] See McMillan, p 83.

[2] See para 2.230 ff.

(h) Completion of diligence by sale or furthcoming

3.106 In considering the completion of an arrestment of a ship or cargo by judicial sale, the following categories of case have to be distinguished.

(1) Where the arrestment is in rem against a ship or her cargo encumbered by a maritime lien, the pursuer may, in the action in rem, apply under RC 143 by motion for an order for sale under the direction of the Deputy Principal Clerk of Session (or the sheriff clerk, as the case may be).

(2) Where the arrestment is against a ship, or a share in a ship, on the dependence of an Admiralty action in personam, there is authority that the pursuer may apply under RC 143 for an order for sale.[1] A separate action for declarator and sale is also competent.[2]

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[1] See Banque Indo Suez v Maritime Co Overseas Inc 1985 SLT 117 where the Second Division held that since RC 143 provides that the pursuer in a Court of Session action may competently apply by motion for an order to sell a ship where the ship has been arrested on the dependence, the pursuer in a sheriff court action who had arrested a ship on the dependence could follow the same procedure in the absence of any sheriff court rule of procedure gainsaying such a procedure.

[2] Maxwell, Practice of the Court of Session (1980) p 389; Encyclopaedia of Scottish Legal Styles (1935) vol 1, pp 334-339. It should be noted that, by virtue of the Administration of Justice Act 1956 s 47 (as read with RC 135), an arrestment of a ship, or a share in a ship, is not competent on the dependence of an action which is not an Admiralty action in personam. Accordingly an ordinary (as distinct from an Admiralty) action of constitution (of the debt), declarator and sale of a ship ceased to be competent when the 1956 Act came into force.

(3) If the arrestment is of a ship in execution of a decree granted in an Admiralty action in personam, or an ordinary action for payment, the pursuer must raise a separate action for declarator and sale of the ship.[1]

(4) If the arrestment is against cargo on the dependence of an Admiralty action in personam (eg where the defender is both owner of the ship and of the cargo), it is thought that the appropriate process is an action of furthcoming though, on one view, RC 143 is in terms wide enough to cover cargo.

(5) If the arrestment is of cargo in execution of a decree for payment, whether granted in an Admiralty action in personam or in an ordinary action for payment, the pursuer must raise a separate action of furthcoming.

3.107 In this Section we are concerned with the following questions:

(a) Is it necessary to make it clear by act of sederunt that the simplified procedure under RC 143 for the sale of a ship under the direction of the Deputy Principal Clerk (or the sheriff clerk, as the case may be) is available in all actions for declarator and sale of a ship separate from actions to constitute the debt?

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[1] An arrestment in execution presupposes that the action has been completed by extract of the decree for payment. RC 143 only makes provision for an incidental application in an Admiralty action which is still in dependence.

(b) In a process of sale of a ship arrested otherwise than in rem, ie a judicial sale:

(i) under RC 143, where the ship has been arrested on the dependence of an Admiralty action in personam; or

(ii) in an action for declarator and sale of a ship arrested either on the dependence of an Admiralty action in personam or in execution of a decree for payment (whether the decree was granted in an Admiralty action in personam or an ordinary personal action for payment),

should the court possess, or continue to possess, power to grant a decree freeing the purchaser's title of all prior incumbrances?

(c) Should RC 143 be amended so as to make it clear that the Deputy Principal Clerk (or the sheriff clerk) has power to effect a sale of a ship, or (in the case of cargo arrested in rem) the cargo, by private bargain instead of public roup?

(d) Should RC 143 be clarified as to exclude expressly the sale of cargo arrested on the dependence of an Admiralty action in personam?

3.108 Simplified sale procedure under RC 143: forms of action in which available. The procedure for sale under the direction of the Deputy Principal Clerk was introduced by a rule

in an act of sederunt in 1934,[1] which is in broadly similar terms to the present RC 143, though there have been some minor modifications made on or before 1948[2] and (to a less extent) 1965 when RC 143 was enacted in its present terms. Prior to 1934, in every action of declarator and sale of a ship, or of constitution (of the debt), declarator and sale, it appears that the procedure for the sale was in practice carried out in stages, each stage being preceded by the appropriate minute and order of the Court.[3] The procedure for sale under the direction of the Deputy Principal Clerk is simpler, since it dispenses with the need for a series of court orders. RC 143 is in the following terms:

> "Order for sale of ship or other arrested property
>
> 143. In an Admiralty action in which a finding is made by the court that the pursuer has a claim which falls to be satisfied out of the arrested res, it shall be competent for the pursuer to apply to the court by motion to order the sale of the ship or other arrested property at such upset price or reduced upset price as the court may fix. Where the sale of the ship or other arrested property is ordered by the court, the entire conduct of the sale, including advertisement, shall be under the direction of the Deputy Principal Clerk. The interlocutor directing the sale, if the res is a ship or a share therein, shall contain a declaration vesting in the Deputy Principal Clerk the right to transfer the ship or share, and the Deputy Principal Clerk shall thereupon be entitled to transfer the ship or share in the same manner and to the same extent as if he were the registered owner thereof. The price received shall be

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[1] Act of Sederunt approving the Rules of Court dated 19 July 1934, Rules of Court, Chapter III, rule 9; consolidated in Act of Sederunt Consolidating Rules of Court 1936, (SR&O 1936/88) Chapter III, rule 9.

[2] RC 1948, rule 159.

[3] Encyclopaedia of Scottish Legal Styles vol 1 (1935) pp 334-337; Maxwell, Practice of the Court of Session p 389.

consigned in the court under deduction of all dues payable up to the date when the court adjudges the ship or other arrested property to belong to the purchaser to Her Majesty's Customs or to the dock or harbour authority within whose undertaking the said ship or other arrested property is then lying and in respect of which such dock or harbour authority has a statutory power to detain the ship or other arrested property. Upon such consignation being made, the interlocutor adjudging the ship or other arrested property shall declare the same to belong to the purchaser thereof, freed and disburdened of all bonds, mortgages, liens, rights of retention and other incumbrances affecting the same and shall order the said ship or other arrested property to be delivered to the purchaser on presentation of a certified copy of the said interlocutor; and the court shall order such advertisement and intimation for claims on the consigned fund as it shall think fit. The court shall, after such enquiry and hearing as it may consider necessary, deal with all questions of expenses and rank and prefer the other claimants in their order of preference to the balance of the said fund, or make such other order as may be just".

There is no doubt that RC 143 applies to arrestments in rem of a ship or her cargo. It is our understanding that RC 143 applies to arrestments of ships on the dependence of Admiralty actions in personam, at least if the court finds that the pursuer's claim falls to be satisfied out of the arrested res. In the Banque Indo Suez[1] case, the Second Division assumed that it did apply to a ship arrested on the dependence. Moreover, RC 143 (third sentence) expressly states that the res (or subjects of sale) may be a share in a ship, and since in principle an arrestment in rem cannot result in a sale of only a share in a ship,[2] RC 143 must have been intended to apply to sales following arrestments on the dependence. The contrary view that the sale must be by a subsequent action of sale[3] seems therefore incorrect.

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[1] Banque Indo Suez v Maritime Co Overseas Inc 1985.

[2] See para 3.6(6) above.

[3] Inglis, p 92.

3.109 It is our understanding that the simplified procedure under RC 143 is available, not only in Admiralty actions in rem and in personam, but also in actions of declarator and sale raised after an action of constitution of the debt has been disposed of, though this perhaps is not immediately obvious. As originally enacted in 1934 and consolidated in 1936,[1] the opening words of the rule stated:

> "In an action in rem or in personam, or in rem and in personam, in which decree is pronounced in favour of the pursuer, it shall be competent..."

It will be seen that these words excluded an action of declarator and sale not combined with an Admiralty action in personam. In 1937, Thomson and Middleton suggested that the simplified procedure under the direction of the Deputy Principal Clerk applied in an action of declarator and sale, but conceded that that form of action was not referred to in the Rules.[2] It was probably to rectify this omission that the rules were amended, on or before 1948[3], so as to provide:

> "In an Admiralty action in which a finding is made by the Court that the pursuer has a claim which falls to be satisfied out of the arrested res, it shall be competent...".

We note that this interpretation is in effect accepted by recent commentaries[4] and we are informed that in practice RC 143 has been followed in actions of declarator and sale. We assume that an action of declarator and sale is an Admiralty action within the

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[1] RC (1934) Chapter III, rule 9; RC (1936) Chapter III, rule 9.

[2] Thomson and Middleton, Manual of Court of Session Procedure (1937) p 169.

[3] RC (1948), rule 159, now RC 143.

[4] Maxwell, Practice of the Court of Session (1980) p 389; Inglis, p 92.

foregoing formula, though it is not mentioned in the (inclusive) definition of Admiralty causes in RC 135 (which is concerned with claims on the merits). We doubt whether any further clarification is necessary but invite views.

3.110 Disburdenment of purchaser's title. It will be seen that RC 143 (fifth sentence) provides that the interlocutor adjudging the ship or other arrested property disburdens the purchaser's title of all encumbrances. This reflects the previous practice in actions of declarator and sale.[1] The practice was considered in The Sierra Nevada,[2] an action in rem, in which Lord Fleming observed[3]:

> "In such cases, it would be an ineffectual proceeding to rank claimants in their order of priority upon the vessel itself, and therefore, in accordance with long-established practice the vessel is sold under the authority of the Court and, after deducting from the price the expenses of sale, the claimants are ranked thereon in their order of priority...
>
> In order to render the judicial sale of a vessel effectual in a case where there are a number of claims against it, it is essential that the vessel should be freed from all claims against it. A sale under any other conditions would be highly inconvenient if not impracticable, as a prospective

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[1] See McMillan (1926) p 27; citing Juridical Styles, vol iii, p 176; "The Sierra Nevada" (1932) 42 Ll L R 309 (action enforcing maritime lien for seamen's wages); Clark v Bowring 1908 SC 1168 (see terms of declarator sought at p 1170; the Session Papers disclose that the decree disencumbered the purchaser's title) (action enforcing maritime lien for seamen's wages); see also Lord Salvesen's Outer House judgment more fully reported sub nom Clark v Hine (1908) 15 SLT 914; Encyclopaedia of Scottish Legal Styles vol 1(1935) p 334, Form No 432; p 337, Form No 434.

[2] (1932) 42 Ll L R 309.

[3] Ibid at p 310.

> purchaser would require to ascertain carefully all the claims which might be enforced against the vessel itself before being in a position to make an offer for it. Under the existing practice, however, it is unnecessary for him to concern himself with these matters. He only requires to consider the value of the vessel on the footing that it will be delivered to him free of all claims, and accordingly it is the usual procedure in such actions that an interlocutor is pronounced...decerning and adjudging the vessel to belong to the purchasers "freed and disburdened of all bonds, mortgages, liens, rights of retention and other incumbrances affecting the same...".By what warrant does the Court free the vessel sold of all incumbrances, etc? In my opinion, the warrant is the long-established practice in the matter and the necessity for such a provision in order to make the sale effectual in the event of a competition".

These remarks were made in the context of an action in rem enforcing a maritime lien. In such an action, the court declares that the pursuer's lien "is preferable to the right of all others having or pretending to have rights in the said (ship, or other maritime res)". A maritime lien is a right in rem and it might be thought that it is the "in rem" character of the decree which justifies the interlocutor disburdening the purchaser's title of all prior encumbrances. As we have seen, however, RC 143 and actions of declarator and sale are not confined to sales of ships arrested in rem, but apply to ships arrested on the dependence of actions in personam, or in execution of decrees in personal actions, whether Admiralty or ordinary actions.

3.111 We entertain some doubts whether disburdenment of the purchaser's title is justifiable in principle where the arrestment is executed in connection with a personal action and not in rem. It is inconsistent with the general rule governing ordinary sales of goods[1] under which a purchaser in good faith acquires no better title to the goods than the seller had. More significantly, it is

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[1] Sale of Goods Act 1979, s 21.

also inconsistent with the law governing the purchaser's title under a warrant sale of poinded goods under which the true owner may obtain restitution from a bona fide purchaser for value at the warrant sale.[1] Furthermore the interlocutor in a sale of an arrested ship adjudging and declaring the ship to belong to the purchaser is analogous to the corresponding interlocutor in an action of furthcoming relating to corporeal moveables, in which the court does not purport to disencumber the purchaser's title.[2] In other words, a judicial sale of corporeal moveables attached by diligence does not as a general rule confer a clear statutory title on a bona fide purchaser for value.[3] Against this background, the disburdenment provisions of RC 143 may appear somewhat anomalous. It has, however been strongly represented to us that the disburdenment provisions are justifiable for broadly the reasons given by Lord Fleming in The Sierra Nevada which (so the argument runs) are applicable to arrestments on the dependence of personal actions as much as to arrestments in rem, and because of the peculiar nature of a ship and its great value. One important peculiarity of ships is that there may be unknown maritime liens in force affecting a ship and since these liens are not registered or registrable, extra protection for bona fide purchasers at judicial sales of ships may be possibly justified on that special ground. We have not reached any concluded view and invite comments on whether the law should be changed in relation to ships arrested otherwise than in rem.

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[1] Carlton v Miller 1978 SLT (Sh Ct) 36.

[2] See RC Form 2(8) (conclusions in actions of furthcoming); interlocutor in Harvie v Mallina Gold Co (unreported, 15 October 1895)(set out in Graham Stewart, pp 847-848).

[3] We note incidentally that the form of interlocutor adjudging a ship to a purchaser in Mackay, Practice of the Court of Session vol II (1879) p 107, fn (a), did not disburden the purchaser's title of prior encumbrances, and it may be that the practice of disburdenment did not at one time apply to arrestments of ships otherwise than in rem.

3.112 Judicial sale by private bargain. It has been represented to us that RC 143 should be amended to make it clear beyond doubt that a judicial sale of a ship under RC 143 may be made by private bargain rather than by public roup. RC 143 provides that the sale shall be under the direction of the Deputy Principal Clerk, but makes no provision as to the mode of sale. In judicial sales generally, and in sales in actions of declarator and sale of a ship, in particular,[1] the traditional mode of sale has been by public roup, though in the case of sales by heritable creditors, the law was changed to permit of a sale by private bargain, subject to the condition that the selling creditor must advertise the sale and take all reasonable steps to ensure that the price is the best price which can reasonably be obtained.[2] We were informed that there have been cases where the prices offered or obtained at public auction have been very much less than would have been obtained if the sale had been by private bargain and that there is a view among ship-brokers that the fact that a vessel is put up for sale by auction usually indicates that there must be something structurally wrong with it: most sales of ships in Scotland are by private bargain. We were also told that there have been cases in which the court has approved a sale by private bargain. We gratefully accept these representations and suggest that RC 143 should be amended to make it clear that the Deputy Principal Clerk (or sheriff clerk) may effect a sale under RC 143 by private bargain, instead of public roup. The court would still require to fix an upset price or reduced upset price in terms of RC 143 (first sentence), which would be based on a valuation, and advertisement of the sale would still be required (RC 143, second sentence). It is probably unnecessary to impose a duty on the Deputy Principal Clerk to secure the best price that can

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[1] Encyclopaedia of Scottish Legal Styles, vol 1 (1935) p 336, Form 434c.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970, ss 25 and 35.

reasonably be obtained. We see no reason why the same power should not apply to the judicial sale of cargo arrested in rem.

3.113 Judicial sale of cargo arrested on the dependence or in execution of personal decree. Before the introduction of special Admiralty procedures in 1934, it seems that an arrestment on the dependence of cargo on board ship was completed by an action of furthcoming in common form raised after decree in the depending action.[1] Literally construed, RC 143 applies to arrestments of maritime property other than ships including arrestments in rem, and seems in its terms to cover also an arrestment of cargo on the dependence of an Admiralty action. We are informed that arrestments of cargo on the dependence of an Admiralty action in personam are most unusual, especially since in most cases the owner of the ship with which an Admiralty action in personam is concerned defending such an action is normally not the owner of the ship's cargo. If such a case did arise, it may be that the sale could be effected under RC 143. This seems rather anomalous, especially since the disburdenment provisions would apply when those provisions do not apply in the case of sales of corporeal moveables in actions of furthcoming. On balance we suggest that RC 143 should be amended to make it clear that it does not apply to cargo arrested on the dependence of an Admiralty action in personam. Where the ship's cargo is arrested on the dependence of an action which is not an Admiralty action, and where it is arrested in execution of a personal decree for payment, the action of furthcoming would not be an Admiralty action and accordingly RC 143 would not apply.

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[1] See eg McDonald & Halket v Wingate (1825) 3S 494; Kellas v Brown (1856) 18 D 1089; as to a furthcoming following arrestment in execution, see eg Carron Co v Currie & Co (1896) 33 SL Rep 578.

3.114

(1) In a judicial sale under RC 143 of a ship arrested on the dependence of an Admiralty action in personam, should the court have, or continue to have, power to pronounce an order freeing the purchaser's title of all incumbrances?

(2) RC 143 should be amended to make it clear that the Deputy Principal Clerk (or the sheriff clerk, as the case may be) has power to effect a sale of an arrested ship, or (in the case of cargo arrested in rem) the cargo, by private bargain instead of public roup.

(3) RC 143 should be amended to make it clear that it does not apply to the sale of cargo arrested on the dependence of an Admiralty action in personam.

(Proposition 38).

(4) Territorial limits on Admiralty jurisdiction and on the competence of Admiralty arrestments

Preliminary

3.115 In this Section we are primarily concerned with the territorial limits within which an Admiralty arrestment against a ship or other vessel may be executed, especially on the landward side. The relevant law is complicated and uncertain. In principle, one would expect that the areas within which Admiralty forms of diligence against ships could be competently executed would be determined by the enactments regulating the territorial jurisdiction of the Admiralty Courts of Scotland because it is a general rule of the law of diligence that warrants for diligence granted by a court can only be competently executed within the territorial jurisdiction of that court, in the absence of either a special statutory rule or of warrants of concurrence granted by the court of the place of execution. Two old cases[1] show that Admiralty arrestments of ships could (at least in some circumstances) be executed outside the verge of the Admiralty Court's jurisdiction, but these cases infringe a general principle of Scots law and it is by no means clear whether they established a counter-vailing principle that Admiralty arrestments may be competently executed anywhere in Scotland. We have therefore felt bound to trace the development of the rules governing the territorial extent of Admiralty jurisdiction within Scotland, especially on the landward side. A summary of the existing law is set out at para 3.151 below.

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[1] Balfour v Stein 7 June 1808 FC; Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC: both discussed at paras 3.145 to 3.149 below.

3.116 These jurisdictional rules also govern at least two other important matters, namely, the place where the cause of action must arise if an Admiralty court is to have jurisdiction, and the place where an incident (such as a collision damaging a ship[1]) must occur if the incident is to give rise to a maritime lien enforceable by Admiralty proceedings in rem. We are concerned only incidentally with the jurisdictional rules or territorial limits on these last-mentioned matters. But they are relevant to the definition of the territorial limits on the competence of arrestment of ships and other vessels, both historically and as a matter of legislative policy and legal principle.

3.117 Closely related to the definition of the territorial limits on Admiralty arrestments is the definition of the subjects attachable by Admiralty arrestments. If, for example, such subjects were to be defined as "sea-going ships" and their cargo and apparel, the extension of the limits of Admiralty arrestments to include freshwater rivers and lochs would be largely nugatory. It is however convenient to deal separately with the definition of maritime subjects or "res", and we revert to that topic at para. 3.169 below.

(a) Development of Admiralty jurisdiction and its territorial limits in Scots law

3.118 In order to ascertain the geographical limits of the right to use an Admiralty arrestment against a ship, ie a 'real diligence' against the ship, whether in rem or on the dependence or in execution against the ship while the owner is in possession, it is necessary to survey the history of the territorial boundaries of the Admiralty Court's jurisdiction in Scotland, as well as the history of Admiralty arrestments.

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[1] See Boettcher v Carron Co (1861) 23 D 322 discussed at para 3.124 below.

3.119 Admiralty Court's exclusive jurisdiction to authorise arrestments of ships etc. The starting point is that, as we have seen, an arrestment of a ship was originally an Admiralty diligence in the dual sense of (a) being competent only in pursuance of a warrant, or warrant of concurrence, granted by the High Court of Admiralty of Scotland or its judge, the Judge-Admiral, and (b) being completed by a process of sale before that Court.[1]

3.120 It has always been a general rule of the law of diligence that warrants for diligence can only be executed within the territorial jurisdiction of the court granting the warrant, unless either a warrant of concurrence is granted by the court within whose territorial jurisdiction the diligence is to be executed or the need for such a warrant has been dispensed with by statute.[2] In the case of arrestments of ships, a warrant for arrestment of the Court of Session, or rather its equivalent - letters of arrestment passing the Signet, and a fortiori a warrant or precept of arrestment by the sheriff or other inferior civil (or criminal) court, could not be executed within the verge of the Admiral's territorial jurisdiction without a warrant of concurrence granted by the Judge-Admiral. As was observed in 1829 in Mackenzie v. Campbell[3]: "The general warrant from this Court" (scil the Court of Session) "never could affect anything on the sea. It was the Admiral's concurrence which formed the warrant". It is likely too that the principal reason why goods on board ship were as a general rule (as they still are) only arrestable by a kind of

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[1] See eg Bankton Institute IV, 12, 9; IV, 41, 9; Baron Hume's Lectures, vol 6, pp 94 - 95.

[2] See eg Graham Stewart, p 275. The need for sheriff court warrants of concurrence has been largely dispensed with by enactments culminating in the Debtors (Scotland) Act 1987, s. 91(1) which however does not apply to arrestments in rem: see para 3.24 above.

[3] (1829) 7 S 899 at p 900 per Lord Cringletie, the other judges concurring. In that case it was held that the Court of Session had no jurisdiction to recall arrestments of a vessel in pursuance of letters of arrestment executed with the concurrence of the Judge-Admiral.

Admiralty arrestment, and not poindable[1], was that where a ship is afloat in a harbour, the goods on board, as well as the ship herself, were beyond the territorial jurisdiction of the ordinary courts of law under whose warrants (or their equivalent signeted letters of horning or poinding) the diligence of poinding was alone competent, but were within the jurisdiction of the Admiralty Court.[2] The general rule was stated by Judge-Admiral Cay in 1802 in a Memorial to the Treasury[3] that "No warrant for the attachment of either person or property issuing from any Court in Scotland, civil or criminal, can be executed on the high seas or within high-water mark without the concurrence of the said judge" (ie. the Judge-Admiral).[4] Conversely, one would have expected that the warrants of the Admiralty Court or Judge-Admiral would not have been capable of execution outside the territorial limits of the Admiralty Court's jurisdiction. We revert to the cases bearing on this below.[5]

3.121 The Admiralty Court Act 1681. The reference to "high-water mark" in the Judge-Admiral's memorial derives from an old common law rule and the Admiralty Court Act 1681[6] which inter alia defined the territorial limits of the jurisdiction of the old High Court of Admiralty of Scotland especially on the landward side. The Act, on the narrative that the High Admiral of Scotland:

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[1] Bankton IV, 41, 9.

[2] This point was made by the defender in Mill v Hoar 18 December 1812 FC; see the pleadings in Hume, Session Papers (unpublished, Advocates' Library) vol 115, No 16 (petition dated 14 December 1812) p 11. Though the defence was unsuccessful, this proposition seems historically accurate.

[3] Set out in Batey, "The Judge-Admiral of Scotland" (1916) 28 Juridical Review 144, pp 146 - 150.

[4] Ibid at p 149.

[5] See para 3.145 ff.

[6] APS, record edn c 82; 12mo edn c 16, repealed by the Statute Law Revision (Scotland) Act 1964.

> "is his Majesty's Lieutenant and Justice General upon the seas and in all ports harbours or creiks of the same and upon fresh waters or navigable rivers below the first bridges or within the flood marks so far as the same does or can at any time extend;..."

provides that the High Admiral has the sole privilege and jurisdiction in all maritime and sea-faring causes, foreign and domestic, whether civil or criminal. It should be noted that the definition is in terms of waters, but it seems that the Act was construed as not altering the Admiralty Court's historic jurisdiction over ships on land below the flood-mark.[1] The concept of the "flood-mark" is deeply embedded in Scots maritime law. It determined for example the area within which ships could be loaded, unloaded and anchored without hindrance.[2] We revert to its definition later.[3] Before the Union of 1707, the High Admiral appointed a depute, the Judge-Admiral, who sat in the Admiralty Court and exercised the jurisdiction vested in the High Admiral in his judicial capacity.

3.122 Subsequent statutory developments. Article XIX of the Treaty of Union, as originally enacted by the ratifying statutes, provided that "all Admiralty jurisdictions be under the Lord High Admiral or Commissioners for the Admiralty of Great Britain"[4] but preserved the Admiralty Court of Scotland until it might be

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1 See eg Baron Hume's Lectures, vol 5, p 276: "within the flood-mark, if ashore".

2 Balfour, Practicks (Stair Society edn) p 626. At one time the Admiralty court could not be held above the flood-mark, unless by special dispensation: ibid p 630.

3 See para 3.159.

4 In Monro v Jackson (1778) Mor 7522, it was observed in the pleadings (at p 7525) that this passage had reference to the ministerial powers of the High Admiral and had no reference to the Admiralty Court of Law which was not subject to the control of the High Admiral or the Commissioners of Admiralty coming in his place. This seems correct.

altered by the Parliament of the United Kingdom.[1] These provisions were repealed by the Statute Law Revision (Scotland) Act 1964,[2] presumably on the ground that as a result of the transfer of Admiralty jurisdiction to the Court of Session and sheriff courts by the Court of Session Act 1830, ss 21 and 22, and the abolition of the Admiralty Court as a separate court, the provisions were spent. After the Union, the Judge-Admiral was appointed by the Vice-Admiral for Scotland (himself appointed by the Lord High Admiral of Great Britain) and after 1782 the power of appointment of the Judge- Admiral was reserved to the Crown

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[1] Article 19 provided: "that the Court of Admiralty now established in Scotland be continued, and that all the reviews, reductions and sentences in maritime cases, competent to the jurisdiction of that Court, remain in the same manner after the Union, as now in Scotland, until the Parliament of Great Britain shall make such regulations and alterations as shall be judged expedient for the whole United Kingdom; so as there be always continued in Scotland a Court of Admiralty, such as in England, for determination of all maritime cases relating to private rights in Scotland, competent to the jurisdiction of the Admiralty Court, subject nevertheless to such regulations and alterations as shall be thought proper to be made by the Parliament of Great Britain".

[2] Sch 1 so far as enacted in the Act of the Parliament of Scotland ratifying the Treaty, and by the Statute Law (Repeals) Act 1973 so far as enacted in the ratifying Act of the Parliament of England.

until the abolition of the Admiralty Court by the 1830 Act.[1]

3.123 As regards the Court of Session, section 21 of the Court of Session Act 1830, on the narrative that "it has become unnecessary and inexpedient to maintain any separate court for maritime or Admiralty causes",[2] provided:

> "the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act;..." (emphasis added).

It would seem to follow that any limits of the territorial jurisdiction of the former Admiralty Court, with respect to the areas within which Admiralty causes of action must arise and the special Admiralty mode of arrestments of ships may be executed, in terms of the Admiralty Court Act 1681, continued in force.

3.124 Survival of 1681 Act limits after Court of Session Act 1830. That the 1681 Act limits did indeed survive the 1830 Act was recognised in 1861 by the Second Division in Boettcher v. Carron Co.[3] which concerned a collision between two vessels in the River Carron. It was held that the maritime doctrine of average, or equal apportionment of damages where both vessels were in fault, applied. Lord Justice-Clerk Inglis observed[4]:

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[1] See the Fourth Report of the Commissioners on the Courts of Justice in Scotland (1818) pp 30 and 43; Parliamentary Papers (HC) 1818 (157); X, p 239. The 1830 Act, s 25 abolished the office of Judge-Admiral.

[2] These words were repealed by the Statute Law Revision (No 2) Act 1980.

[3] (1861) 23 D 322.

[4] Ibid at p 330 (the other judges concurring).

> "In the present action, we are in the exercise of our admiralty jurisdiction - of that jurisdiction which was transferred to this Court when the High Court of Admiralty was abolished by the Act II Geo. IV, and 1 Gul. IV, c. 69, sect. 21 - an original jurisdiction in all maritime civil causes and proceedings, which was not competent to this Court while the High Court of Admiralty existed, and in the exercise of which this Court is bound to administer the maritime law, according to the same rules and principles which formerly guided the High Court of Admiralty and the Court of Session itself, as a Court of review of the judgments of the Judge-Admiral.
>
> That this is a maritime cause, seems to be one of the very few points not disputed in argument. The collision took place, not in the open sea, but in a navigable river, the Carron. But the jurisdiction of the Admiralty Court of Scotland is not confined to the high seas, but extends to "all ports, harbours, or creiks of the same, and fresh waters or navigable rivers below the first bridge, or within the flood's mark, so far as the same does or can at any time extend"- (1681, c. 16). And within these limits it is sole and exclusive in maritime causes".

The 1681 Act was subsequently repealed by the Statute Law Revision (Scotland) Act 1964 but the definition of the territorial limits may on one view, still have effect and we revert to the repeal below.[1]

3.125 As regards the sheriff courts, the Court of Session Act 1830, s. 22, provided that:

> "the sheriffs of Scotland and their substitutes shall, within their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds, in or adjoining such sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, of the same nature as that heretofore held by the High Court of Admiralty". (emphasis added).

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[1] See para 3.127.

It will be seen that reference to "the extent" of the Admiralty Court's jurisdiction in s. 21, is not repeated in s. 22. It seems unlikely to have been Parliament's intention, however, that the sheriffs were to exercise an admiralty jurisdiction wider in territorial extent than that of the Court of Session. [1]

3.126 The Sheriff Courts (Scotland) Act 1907 repealed s. 22 of the Court of Session Act 1830, and the territorial jurisdiction of the sheriff is now governed by section 4 of the 1907 Act which provides:

> "The jurisdiction of the [sheriffs principal], within their respective sheriffdoms shall extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms. And the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, shall be competent to the [sheriff principal], provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the [sheriff principal] before whom such cause or proceeding may be raised, and provided also that it shall not be competent to the [sheriff principal] to try any crime committed on the seas which it would not be competent for him to try if the crime had been committed on land; Provided always that where sheriffdoms are separated by a river, firth, or estuary, the [sheriff principal] on either side shall have concurrent jurisdictions over the intervening space occupied by water".

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[1] We have not traced any discussion of Admiralty limits on the landward side as applying in the sheriff court. Dobie, Sheriff Court Practice p 272 simply states that "a ship can be arrested only if she is within the jurisdiction of the court, and is either in harbour or is at anchor in a roadstead". But the cases cited relate to limits on the seaward side.

This provision is also somewhat ambiguous on the question whether the territorial limits of the Admiralty Court's jurisdiction now apply to the Admiralty jurisdiction of the sheriff courts. It is thought that if it had been the legislative intention to extend the territory of the sheriff's Admiralty jurisdiction beyond that of the Court of Session, much clearer words would have been needed.

3.127 Repeal of the 1681 Act by Statute Law Revision (Scotland) Act 1964. The Admiralty Court Act 1681 was repealed by the Statute Law Revision (Scotland) Act 1964. The 1964 Act did not expressly save the effect of the 1681 Act so far as jurisdiction was concerned,[1] because the practice of inserting so-called "Westbury savings clauses" (which had contained such a saving) in Statute Law Revision Acts was discontinued in the 1950s.[2] The 1964 Act was intended to repeal obsolete, spent, unnecessary or superseded enactments but, insofar as the 1681 Act defined the territorial limits of Admiralty jurisdiction, it was still in force. The 1964 Act did not abrogate the common law rule conferring Admiralty jurisdiction on land within Scotland below the flood-mark which therefore may still be in force.

3.128 Two views are possible on whether the definition in the 1681 Act of the waters subject to Admiralty jurisdiction in

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[1] As was done in similar circumstances in English law when the Act 13 Ric 2, stat 1 (1389 - 90) was repealed by the Civil Procedure Acts Repeal Act 1879.

[2] See Peter M McDermott, "Statute Law Revision Statutes - Westbury Savings" [1988] Statute Law Review 139. The savings clauses in the Interpretation Acts of 1893, s 38, and 1978, s 16, save existing vested rights acquired under the repealed enactment but do not expressly preserve the jurisidiction of a court conferred by the repealed enactment.

Scotland is still in force. On one view, the definition has been repealed and no longer has effect. The result (on this view) is that Admiralty actions in Scotland can now be brought in respect of causes of action arising in Scottish tidal and non-tidal waters except where the substantive law relating to particular causes of action determines the place where the cause of action must arise. The effect, on this view, is broadly the same as that reached by a very different route by English law in terms of the Supreme Court Act 1981, s 20(7)(b) as construed by the House of Lords in The Goring.[1] This view gives literal effect to the repeal of the 1681 Act. It avoids what has been described as "the fool's position that an Act has been expunged from the Statute Book but that its effect is still there and, of course, that nobody can find it".[2] The enactments on salvage[3] discussed below[4] are examples of substantive law rules determining the place where a particular Admiralty cause of action must arise. There may be common law rules on other Admiralty causes of action which may be construed as requiring a maritime location (eg the doctrine of general average which applies only to maritime adventures[5]) In the absence of judicial decisions on particular causes of action, the law is uncertain.

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[1] [1988] 1 AC 831 (HL): see para 3.139 below.

[2] Seventh Report by the Joint Committee of House of Lords and of the House of Commons appointed to consider Consolidation Bills HL 108, (1957-58) HC 209; Minutes of Evidence, p 2 (Mr C H Chorley, Parliamentary Counsel), quoted by McDermott, supra, [1988] Statute Law Review 139 at p 141.

[3] Merchant Shipping Act 1894, s 544 (salvage of life); s 546 (salvage of ships and related property); Civil Aviation Act 1982, s 87(1) (aircraft in, on or over sea or tidal waters); Hovercraft (Application of Enactments) Order 1972, (SI 1972/971) article 8(1)(a).

[4] See paras 3.143 - 3.144 (salvage of ships); 3.182 (aircraft); 3.195 (hovercraft).

[5] Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners) [1947] AC 265 at p 310 per Lord Uthwatt: "The principle involved in general average contribution is peculiar to the law of the sea and extends only to sea risks".

3.129 The other view as to the effect of the repeal of the 1681 Act is that, since the provisions of that Act were not spent insofar as they defined the territorial limits of the Admiralty jurisdiction of the Scottish courts, the 1964 Act's repeal of the 1681 Act cannot have been intended by Parliament to change the law. It would, on this view, be a very surprising result of statute law revision if the repeal of an Act, characterised by the repealing Act as spent or superseded, had the dramatic result of widening the Admiralty territorial jurisdiction to the whole of Scotland. To put the point another way, the 1830 Act, s 21 and the 1907 Act, s 4 confer Admiralty jurisdiction on the Scottish courts subject to the old territorial limits described by narrative provisions in the 1681 Act: arguably all that the 1964 Act did by its repeal was to remove the description from the statute book, but the effect of that description is preserved by the 1830 Act, s 21, and the 1907 Act, s 4. On this view, the old territorial limits described by the 1681 Act are still in force and apply except where, as above-mentioned, the substantive law relating to particular causes of action determines the place where a cause of action must arise.

3.130 This uncertainty is clearly unsatisfactory and we revert below[1] to the questions of whether or how the law should be clarified.

3.131 Common law authorities on territorial limits on cause of action. Generally speaking, the Institutional writers discuss the territorial limits of the Admiralty jurisdiction before 1830 in the context of whether the cause of action must have arisen within these limits. Erskine[2] defines the exclusive jurisdiction of the

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[1] See para 3.152 ff.

[2] Institute I, 3, 33.

Admiralty Court in civil maritime causes by reference to their subject matter adding "and, in general, all contracts concerning the loading or unloading of ships, or any other matter to be performed within the verge of the admiral's jurisdiction;..." (emphasis added). Later he points out that the Admiralty Court exercised by prescription or long possession a concurrent jurisdiction in certain non-maritime, mercantile causes.[1] Baron Hume emphasises both the maritime nature of the cause and the place of performance or damage: with regard to the latter he says that "a case cannot well be reckoned maritime, unless it relates to something which has happened, or something that is to be done or performed within the Admiralty territory, - at sea, or within the flood-mark, if ashore".[2] In support, Hume cites Walker v. Campbell (1803).[3] A shipmaster who had taken goods from London to Leith delivered the goods to the wharf of a maritime agent at Leith to remain in his care until a vessel could be found to transport them to their ultimate port of destination, Dunbar. The goods were then shipped on another ship to Dunbar where they were found to be damaged. The owner of the goods raised an action against the shipmaster and owner of the first ship and the maritime agent in the Admiralty Court. On a bill of advocation, the Court of Session held that the action so far as laid against the maritime agent was not maritime. As Baron Hume explains,[4] though the action was "brought against a wharfinger, and for the damage done to goods delivered to hm from on board of ship; yet that damage was laid to have happened in the wharfinger's store or warehouse, which was not within the Admiral's bounds".

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1 Institute I, 3, 34.

2 Baron Hume's Lectures, vol 5, p 276: "to make a case maritime, the ground of action must have arisen within the verge of the Admiral's territory" (idem).

3 15 June 1803 F C; Mor 7537.

4 Baron Hume's Lectures, vol 5, p 276.

3.132 By contrast, in his Notes to the 1824-28 edition of Erskine's Institute,[1] Lord Ivory remarked: "The ruling circumstance to be noticed, in distinguishing whether a cause is peculiar to the Admiralty Court, is the nature and character of the transaction which gives rise to the question, and by no means the locus contractus as being within or without the territory prescribed by law to the office of judge-admiral". Bell gave a similar opinion and emphasised that the Scottish Court of Admiralty enjoyed a wider jurisdiction than the English Admiralty Court's jurisdiction. He observed:

> "The Scottish Court of Admiralty is so far different from that of England, that to this tribunal belongs the decision of 'all maritime and sea-faring causes', relative to charter-parties, freights, salvages, wrecks, collisions of ships, bottomry and policies of sea insurance, without any regard to the place of the contract as executed on sea or at land; while in all mercantile questions also this Court has jurisdiction".[2] (emphasis added).

In a footnote, he remarks that the "Admiralty in England cannot meddle of anything done within the realm, but only of a thing done upon the sea", and refers to two statutes of Richard II's reign excluding the English Admiralty Court's jurisdiction from matters arising "within the body of a county".[3] These statements of the law are incomplete (no reference is made to the locus delicti or place of the damage which Baron Hume dealt with) and to some extent ambiguous, since the expression "executed" may possibly have reference to the place of the making of the contract (the locus contractus, which must indeed be irrelevant) or the place of performance (which must in some cases be relevant to the question whether the transaction is maritime).

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[1] Note to Erskine, Institute I, 3,33.

[2] Commentaries, vol 1, p 546.

[3] Ibid in 6. See para 3.135 below.

3.133 Despite Lord Ivory's and Bell's strictures, the case of Boettcher v. Carron Co.[1] quoted above shows conclusively that the 1681 Act territorial limits applied so as to regulate the place of the cause of action at least in collision-damage cases. Moreover, the case is significant because although Lord Justice-Clerk Inglis affirmed that the maritime or admiralty law of Scotland was the same as that of England,[2] in remarks which were approved by the House of Lords in Currie v. McKnight,[3] his Lordship nonetheless clearly stated that the limits within which the Admiralty jurisdiction was exercisable, could be, and were, different. He observed:

> "Much use was made by the defenders, in the course of the argument, of a class of cases decided in the Common Law Courts of England, applying the rule of the common law to collisions of ships in rivers. The simple answer to these cases, when cited as authorities here, is, that the Courts in which they occurred were not Admiralty Courts, and had no other law to apply than the common law, which alone they administered. This apparent anomaly is explained by attending to the simple facts, that since 1830 this Court has both an admiralty and a common law jurisdiction, and is bound to administer and apply maritime law in maritime causes, and common law in common law cases; that their admiralty jurisdiction extends to all navigable rivers as well as the high seas, and that, therefore, cases of collision of ships in rivers, which in England would be tried in the Common Law Courts, fall within the admiralty jurisdiction of this Court, to the exclusion of its common law jurisdiction".[4]

In fact, the jurisdiction of the English Admiralty Court was wider in 1861 than Lord Justice-Clerk Inglis assumed. By the Admiralty

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[1] (1861) 23 D 322.

[2] Ibid at pp 330-331.

[3] (1896) 24R (HL) 1 at pp 2, 4, 6 and 7-8.

[4] (1861) 23 D 322 at p 332.

Court Act 1840, s 6, its jurisdiction was extended inter alia to claims in respect of "damage received by any ship or sea-going vessel... within the body of a county". In 1861 it was further extended to claims for damage done by "any description of vessel used in navigation not propelled by oars" including such claims within the body of a county.[1] The English Common Law actions referred to in Boettcher were all decided in the 1850s.[2] It is not clear to us why such cases were not brought in the English Admiralty Court but it may be that they did not involve sea-going vessels, or the river in each case was non-tidal, or the plaintiff chose an inappropriate forum.

3.134 Different Scots and English enactments on the territorial limits of Admiralty jurisdiction. In the recent English case of The Goring,[3] the House of Lords held that services rendered to a vessel on a non-tidal stretch of an English river could not be salvage services for the purposes of the powers of the English High Court, under its Admiralty jurisdiction, to make an award of salvage. In that case the House accepted the defendant's argument that to concede to the English High Court a jurisdiction in salvage claims "wherever arising"[4] would make an undesirable difference between English and Scots law. Lord Brandon remarked:

> "Since there is, in general, no difference in substantive Admiralty law between England and Scotland, it would be

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[1] Admiralty Court Act 1861; ss 2 and 7: see Marsden The Law of Collisions at Sea (11th edn, 1961) p 310. (British Shipping Laws Series, vol 4.)

[2] Morrison v General Steam Navigation Co (1853) 8 Exch 733; Dowell v General Steam Navigation Co (1855) 5 El and Bl 195; Tuff v Warman (1857) 5 CB(NS) 573.

[3] [1988] 1AC 831 (HL).

[4] See Supreme Court Act 1981, s 20 (7)(b).

> surprising if the legislature, by applying the expression to claims for salvage in England, but not applying it to claims for salvage in Scotland, intended to create just such a difference".[1]

It is thought that these remarks cannot be taken out of context so as to reach the conclusion that the substantive law on the landward territorial limits of the Admiralty jurisdiction of the Scottish courts in Admiralty causes generally (eg in towage, pilotage, etc) is the same as the law on the corresponding limits of the Admiralty jurisdiction of the English courts. The Admiralty jurisdictions of the Scottish and English courts are largely regulated by different series of enactments which happen to have, or have had, a measure of overlap in salvage cases.[2] In The Goring, there was (perhaps understandably) no citation of the Scots Admiralty Court Act 1681, or the Boettcher case[3] or the Statute Law Revision (Scotland) Act 1964, and no reference to the partial supersession of the 1681 Act in Scotland by the Merchant Shipping Act 1894, s 565, which provision was referred to only from an English standpoint.[4] Moreover the main authority on the Scots law of salvage cited to the House was the reference to salvage, in the article by Mr John Carmont KC (as he then was) on "Salvage" in The Encyclopaedia as being "saving property or life in danger at sea".[5] This was not intended to be a precise definition of the territorial limits of Scots Admiralty jurisdiction on the landward side, even in salvage cases.

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[1] [1988] 1 AC 831 (HL) at p 853.

[2] See Merchant Shipping Act 1894, s 565 (still in force in Scotland but repealed quoad England). We revert to this below.

[3] Boettcher v Carron Co (1861) 23 D 322, discussed above.

[4] [1988] 1 AC 831 (HL) at p 849.

[5] Encyclopaedia, vol 13, para 481.

3.135 The Court of Session's special jurisdiction in salvage under the Merchant Shipping Act 1894, s. 565. The provisions of this Act can only be understood against the background of the statutes regulating Admiralty jurisdiction in England and Wales. As we have seen, originally the territorial jurisdiction of the English Admiralty Court was much more limited on the landward side than the jurisdiction of the Scots Admiralty Court under the 1681 Act. As a result of two statutes of 1389 and 1391 in the reign of Richard II,[1] the jurisdiction of the English Admiralty Court was confined to the high seas, and was not permitted "within the body of a county" even in tidal waters. The precise extent of the territorial jurisdiction was not clear. It appears that, with the exception of waters "within the body of a county", the court had exclusive jurisdiction below low water mark, and, between high and low water marks, concurrent jurisdiction with the common law courts.[2] The statutory phrase "body of a county"[3] refers to tidal waters above low water mark or parts of the sea "within the fauces terrae, where a man may reasonably discern between shore and shore".[4] The upshot was, as Thomas remarks, "that salvage services rendered to property cast on the sea shore, or within a port, dock or harbour, or within a haven, channel, estuary, or other like places, were outside the jurisdiction of the High Court of Admiralty".[5] The English Court of Admiralty claimed jurisdiction in the tidal waters of rivers up to the first bridge, but was prohibited from exercising such

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1 Jurisdiction of Admiral and Deputy Act 1389 (13 Ric 2, st 1, c 5); Admiralty Jurisdiction Act 1391 (15 Ric 2, c 3). As to the terms of these Acts see Holdsworth, A History of English Law (7th edn; reprint 1966) vol 1, p 548; The Goring [1987] QB 687, at pp 691, 717.

2 See Thomas, pp 146-147.

3 Which appears in the Admiralty Jurisdiction Act 1391.

4 Hale, De Jure Maris (1787) c (iv) p 10.

5 Thomas p 147, adopted by Lord Brandon in The Goring [1988] 1 AC 831 (HL) at p 846.

jurisdiction.[1]

3.136 The Admiralty Court Act 1840, s. 6 extended the jurisdiction of the English Admiralty Court in claims in the nature of salvage, damage to ships, towage and supply of necessaries to cases where the ship receiving the salvage, damage, towage or necessaries was "within the body of a county". In The Goring[2] as we have seen it was held that the expression "within the body of a county" did not include non-tidal inland waters (other than enclosed wet docks) though it did include tidal inland waters. This jurisdiction "within the body of a county" was reaffirmed by section 476 of the Merchant Shipping Act 1854 so far as applying to salvage. That section did not extend to Scotland.

3.137 The 1854 Act was replaced by the Merchant Shipping Act 1894, section 565 of which re-enacted the provisions of section 476 of the 1854 Act in the same terms except that it extended them to the Court of Session. Section 565 of the 1894 Act provided:

> "Subject to the provisions of this Act, the High Court, and in Scotland the Court of Session, shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the body of any county, or partly on the high seas and partly within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land". (emphasis added).

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[1] The Goring, supra at p 846.

[2] [1988] AC 831 at p 847.

This provision was repealed in 1925 quoad the High Court in England,[1] and in 1956 quoad Northern Ireland,[2] but remains in force quoad Scotland.

3.138 It is not clear why it was felt necessary to apply the provisions of this section to the Court of Session. The Scottish courts were before 1894 already exercising jurisdiction in salvage actions where the salved vessel was within "the body of a county" in the sense of English law,[3] because (as already noted) the 1681 Act applied so as to give Admiralty jurisdiction below the flood-mark. The result is however that the territorial limits of the jurisdiction in salvage are now governed by an essentially English enactment which is no longer in force in England.

3.139 The jurisdiction of the English High Court in salvage was again enacted in the Supreme Court of Judicature (Consolidation) Act 1925, s. 22(1)(a)(v), substantially re-enacting the provisions of section 565 of the Merchant Shipping Act 1894. That section was repealed quoad England, as was the Admiralty Court Act 1840, s. 6. The expression "within the body of a county" dropped out of the English statute book in 1956. The Administration of Justice Act 1956, s.1 replaced s. 22 of the 1925 Act. Section 1 of the 1956 Act provided that:

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1 Supreme Court of Judicature (Consolidation) Act 1925, s 226, Sch 6.

2 Administration of Justice Act 1956, Sch 1, Part III.

3 See eg Robinson v Thoms (1851) 13 D 592 (steam tug which towed a disabled vessel from Aberdeen Bay into Aberdeen Harbour held entitled to a share in salvage); Lawson v Grangemouth Dockyard Co (1888) 15 R 753 (salvage or towage of ship which ran on bank on the west side of the entrance to the River Carron in the Firth of Forth); Walker v North of Scotland Steam Navigation Co (1892) 19R 386 (salvage of ship which ran on rock near mouth of Aberdeen Harbour in Aberdeen Bay).

"(1) The jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims -

(j) any claim in the nature of salvage;...

(3) The reference in paragraph (j) of subsection (1) of this section to claims in the nature of salvage includes a reference to such claims for services rendered...in preserving cargo, apparel or wreck as, under sections 544 to 546 of the Merchant Shipping Act 1894... are authorised to be made in connection with a ship...

(4) The preceding provisions of this section apply -

(b) in relation to all claims, wheresoever arising...".

In The Goring[1] it was held[2] that subsection (4)(b) did not have the effect of extending the cause of action in salvage to services rendered in non-tidal inland waters. Section 1(4)(b) was construed as meaning "wheresoever arising having regard to the localities in which, under the substantive law of salvage, such claim is capable of arising".[3]

3.140 The Supreme Court Act 1981 is a consolidating measure, section 20 of which restates the Admiralty jurisdiction of the English High Court in terms similar to the provisions of section 1 of the 1956 Act which it replaced.[4] Since the 1956 Act did not enlarge the Admiralty jurisdiction to cover salvage services in inland non-tidal waters, the 1981 Act, s. 20 did not do so either.[5]

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[1] [1988] 1AC 831 (HL).

[2] At pp 852-854.

[3] Ibid p 854.

[4] Section 20(7) of the Supreme Court Act 1981 refers to claims "wherever arising".

[5] The Goring [1988] 1AC 831 (HL) at pp 854-855.

3.141 Proposed repeal of Merchant Shipping Act 1894, s. 565. We think that section 565 of the Merchant Shipping Act 1894 should be repealed. First, it is in its origins an essentially English enactment the construction of which requires lengthy analysis of old English authorities stretching back to 1389. Second, it has been repealed in its application to the other parts of the United Kingdom. Third, so far as it regulates, or purports to regulate, the place where the cause of action in salvage must arise, it overlaps with the Merchant Shipping Act 1894, s. 546.[1] Fourth, insofar as it confers jurisdiction in salvage actions on the Court of Session, it unnecessarily duplicates the Court of Session Act 1830, s. 21. Fifth, the Court of Session and sheriff courts in general exercise a concurrent jurisdiction in Admiralty causes and it is undesirable to make different provisions on Admiralty jurisdiction as between the two courts.

3.142 We propose:

> **Section 565 of the Merchant Shipping Act 1894 (jurisdiction of Court of Session in salvage actions) should be repealed as unnecessary, but saving the jurisdiction of the Court of Session in salvage actions under the Court of Session Act 1830, s. 21.**

(Proposition 39).

3.143 Enactments regulating salvage of ships and life as a cause of action. The Merchant Shipping Act 1854, s. 458, and the Merchant Shipping Act 1894, s. 546 (which replaced it and is still in force[2]) prescribed the places in which it was necessary for

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[1] See para 3.143 below.

[2] As amended by the Merchant Shipping Act 1988, s 48 and Sch 5, para 3.

services to a ship, her cargo, or her apparel to have been rendered in order to qualify as salvage services within the United Kingdom. The 1894 Act, s. 546 refers to "any vessel...wrecked, stranded or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom". Services rendered on the shores of inland non-tidal waters are not referred to. Section 742 of the 1894 Act provides that, unless the context otherwise requires:

> "'Harbour' includes harbours, properly so called, whether natural or artificial, estuaries, navigable rivers, piers, jetties, and other works in or at which ships can obtain shelter, or ship or unship goods or passengers;
>
> 'Tidal water' means any part of the sea and any part of a river within the ebb and flow of the tide at ordinary spring tides, and not being a harbour,...".

In The Goring[1], it was observed[2] that the "result of applying the very wide definition of 'harbour' to the definition of 'tidal water', and then applying the definition of 'tidal water' so produced to interpret section 456, is to exclude from the meaning of 'tidal water' in that section numerous localities which might be expected to be included in it". The problem was solved by the Merchant Shipping Act 1988[3] which added a new subsection (2) to s 546 of the 1894 Act enacting a special definition of "tidal water" solely for the purpose of that section in the following terms (which omit any reference to a harbour):

> "(2) In this section 'tidal water' means -

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[1] [1988] 1AC 831 (HL); see also The Powstaniec Wielkopolski [1988] 3 WLR 723.

[2] Ibid at pp 849-850 per Lord Brandon.

[3] S 48, and Schedule 5, para 3.

(a) any waters within the ebb and flow of the tide at ordinary spring tides; or

(b) the waters of any dock which is directly, or (by means of one or more other docks) indirectly, connected with such waters".

Para (b) gives effect to English cases concerning enclosed docks.[1]

3.144 Section 544 of the Merchant Shipping Act 1894, in regulating salvage payable for saving life (as distinct from salvage of property), defines the place where salvage services are rendered more extensively than in the case of salvage of cargo or wreck under section 546. Section 544 refers to services "rendered wholly or in part within British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel...".[2] British waters include broadly speaking the open sea within 12 nautical miles from the shore,[3] being the territorial limits of the United Kingdom. On a literal construction salvage of life services may be rendered in inland non-tidal waters,[4] but we have traced no case.

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[1] See The Goring [1988] 1 AC 831 (HL) at pp 847 and 856.

[2] As to the interpretation of this section, see Temperley, Merchant Shipping Acts (7th edn) pp 202 - 204, paras 494 - 497 (British Shipping Laws Series, vol 11); Jorgensen v Neptune Steam Fishing Co Ltd (1902) 4 F 992, and cf The Pacific [1898] P 170.

[3] Temperley, supra, p 203, para 495; Territorial Sea Act 1987. The breadth of the territorial sea is measured from baselines defined by Order-in-Council.

[4] An argument to that effect was advanced by the plaintiffs' counsel in The Goring [1988] 1 AC 831 at p 836.

(b) Territorial limits on competence of Admiralty arrestments

3.145 We have seen that an Admiralty arrestment of a ship in a sea-harbour or anchorage required a warrant, or warrant of concurrence, by the Judge-Admiral,[1] and conversely one would have expected that in principle an Admiralty arrestment of a ship could only be executed at sea, or on a navigable fresh water river below the first bridge or below the flood-mark, conform to the 1681 Act, or below the flood-mark if ashore, conform to the common law.[2] There are, however, two reported cases in which ships have been attached by an Admiralty arrestment on the dependence on dry land above the flood-mark.[3]

3.146 The leading case is Balfour v. Stein (1808)[4] in which the Court of Session, on advocation from the Admiralty Court, held that an Admiralty arrestment on the dependence of a vessel (a sloop or sea-going ship) was competent where she was under construction on the stocks and had never been waterborne. The arrestment was executed by affixing a copy of the schedule of arrestment on the stern of the vessel, there being no mast. The gist of parts of the parties' pleadings are reported. The defender argued that the pursuer's arrestment "was null, because admiralty arrestments only applied to ships that were afloat, or at least capable of putting to sea, and were executed by fastening the copy on the mast; and that the regular way of attaching the vessel was by poinding".[5] The pursuers contended "that this mode of admiralty arrestment was common, both of ships of which the

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[1] See para 3.120 above; Mackenzie v Campbell (1829) 7 S 899.

[2] See para 3.121 above.

[3] Balfour v Stein 7 June 1808 FC; Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC.

[4] 7 June 1808 FC; Mor "Arrestment" App'x No 5.

[5] Idem.

masts were not yet built, and of boats that never had masts at all; and that it was sufficient, in order to make a vessel the proper subject of admiralty arrestment, that the building of her had gone so far that she was properly denominated a ship".[1] The Court held that the vessel in question was legally and effectually attached by the arrestment.

3.147 Baron Hume's Session Papers[2] disclose that the defender argued, not only that the thing arrested was not yet a ship or vessel, but also that "as a maritime arrestment, it was plainly incompetent, as being executed out of the Admiral's maritime jurisdiction".[3] The defender pleaded[4] that the unfinished frame of the ship, to which the arrestment:

> "was most incompetently applied, was not placed within high-water mark, but was a mere collection of timber and iron in the private yards of the carpenter.
>
> The diligence of maritime arrestment, is a process which can only issue out of the Court of Admiralty, and is, therefore, limited in its own nature to subjects which are properly maritime, and are placed within the maritime jurisdiction of that court. A ship which is in the water, or within high-water mark, is evidently of this description; and the great value of such a subject, taken in combination with the power it affords the possessors of removing it at any moment, out of the reach of all the courts of the country, has evidently suggested this peculiar diligence, which is executed against the vessel itself, to the effect of detaining it, and subjecting it to the ordinary process of sale. But the frame or rudiments of a ship in the yard of a ship-carpenter, evidently is not a subject of that description. It is not within the peculiar territory of the Admiral; nor can it be suddenly removed to a foreign country, so as to justify or to require the peculiar process

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1 Idem.

2 Hume, Session Papers (unpublished, Advocates' Library) vol 99, No 31, Petition on behalf of Robert Stein.

3 Ibid, p 9.

4 Ibid, pp 19-20.

by which a ship in a harbour may be arrested". (emphasis added).

3.148 In response to the argument that the vessel was not placed within high-water mark when the arrestment was used, the pursuers observed[1]:

> "The situation chosen for building the vessel, and where she was lying when the arrestment took place, was on the edge of the river Black Devon, or Pow of Clackmannan, removed from the river only about eleven feet; this being indispensibly necessary to prevent her from being washed away by the tides during the process of the work. She was near enough high-water mark to be launched easily, when ready for launching. This is all that can be said of any ship or vessel whatsoever, until the hull is finished; and very few indeed are built so near high-water mark as within eleven feet of it. But your Lordships surely, on this account, would not hold that a vessel is not a fit subject of maritime arrestment, until she is actually brought within high-water mark. When the hull is built, it is a maritime subject, and therefore must be attachable by maritime arrestment. Owing to particular circumstances, as before observed, the vessel may not be launched, for months or for years after the hull is built. In such a case, according to the argument maintained in the petition, no arrestment whatever would affect the vessel; nay, what is more, she would be wholly without the reach of any species of diligence. As to poinding, your Lordships see it laid down expressly by Lord Bankton,[2] that it is an inept diligence with reference to a vessel; and that an arrestment under the authority of the Judge-Admiral, is the only competent diligence against such a subject. The poinding of a vessel indeed, even according to the account given of the one in question by the petitioners themselves, with her keel laid, and a few ribs or great timbers put in, is plainly impracticable, as such a subject does not admit of being carried to the next market-cross, in order to be valued by the appraiser. In a word, the doctrine maintained in the petition would place this kind of property beyond the reach of creditors altogether; a doctrine, the respondent will humbly beg leave to say, which is not only contrary to daily practice, but also

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[1] Hume, Session Papers, vol 99, No 31, Answers for James Balfour, pp 23-24.

[2] The reference is to Bankton IV, 41, 9: "Goods on board of a ship cannot be poinded, even with the concurrence of the judge-admiral; but only arrested, as the ship itself may, and thereafter brought to a sale, in a proper action before the admiral-court".

irreconcileable to the ordinary rules of law".(emphasis in original).

While the Court upheld the validity of the arrestment, it is unclear what elements of this argument were accepted by the Court. In Mill v. Hoar (1812)[1] it was held that the validity of an Admiralty arrestment of a ship under construction on the stocks, on the dependence of an Admiralty Court action for debt, was unquestionably established by Balfour v. Stein.

3.149 The ratio of Balfour v. Stein[2] is however not altogether clear because the judges' reasoning is not reported. The following observations may be made. First, the Session Papers disclose that the arrestment was executed outside the Admiralty Court's territorial jurisdiction and arguments on the significance of this were addressed to the Court which nevertheless upheld the validity of the Admiralty arrestment.[3] Second, though Graham Stewart[4] says that in Balfour v. Stein it seems to have been assumed that either arrestment or poinding of a ship was competent, that is true only of the argument of the unsuccessful defender. The Session Papers disclose that the successful pursuers founded strongly on the proposition advanced by Bankton[5] that a poinding of a ship is incompetent, with the necessary result that if an Admiralty arrestment were not competent, the ship would not be attachable by any form of diligence and would be beyond the reach of the defender's creditors. Third, if the ground of decision in Balfour v. Stein is that ships wherever situated can only be attached by an Admiralty arrestment, (since poinding is not competent), then vessels on inland waters outside the Admiralty Court's territorial jurisdiction, such as navigable freshwater rivers (beyond the first bridge) or inland lochs, must likewise be

1 18 December 1812 FC.

2 7 June 1808 FC; Mor "Arrestment" App'x No 5.

3 It could be that the place of execution was so near the flood-mark as to be de minimis in the opinion of the Court but in Mill v Hoar 18 December 1812 FC there is no hint that Balfour v Stein was based on such a specialty.

4 p 344.

5 IV, 41, 9.

arrestable by an Admiralty arrestment if they are not to be beyond the reach of creditors' diligences. We have not traced any case on the competence of arrestment or poinding of vessels on such inland waters. In the two cases cited above, involving ships under construction ,[1] the ships appear to have been sea-going ships, and there may be special considerations applying to sea-going ships under construction. Ships usually have to be constructed on dry land. Fourth, if the question were to arise today whether the poinding of a ship on (say) an inland non-tidal loch was competent in execution of a decree, account might have to be taken of the argument that, at the time when the rule allowing the arrestment and prohibiting the poinding of ships was fixed, it was normally necessary to carry the poinded goods to the market cross for valuation.[2] That requirement however had been abolished in an Act of 1793 even before Balfour v. Stein was decided in 1808,[3] and while the abolition does not appear to have been brought to the attention of the court it would be unsafe to assume that the Court was unaware of it. In any event, once the rule allowing the arrestment of ships and prohibiting their poinding was fixed, it could not be abrogated by a change in the procedure for poinding. The matter is not however free from doubt and the law requires clarification.

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[1] Balfour v Stein 7 June 1808 FC; Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC.

[2] Bell, Commentaries, vol 2, p 60, argued that it should have been sufficient to carry the rudder to the market cross, like the coulter of a plough (Smeton v Brand (1698) Mor 10524), but such a symbolic step seems never to have been accepted in Scots law so as to permit of the poinding of a ship.

[3] Payment of Creditors Act 1793, s 5; see Graham Stewart p 348.

3.150 To sum up, while it is a fundamental principle of Scots law that diligences authorised by the warrant of a court cannot be competently executed outside the territorial jurisdiction of the court, that principle did not apply in the case of arrestments of ships authorised by the Admiralty Court, at least in the case of ships under construction outside the territorial limits of the Admiralty Court's jurisdiction. This exception may have been based on a general rule that maritime subjects are only attachable by Admiralty arrestments. In the absence of modern case-law on the point, it is unclear whether Admiralty arrestments of ships may be competently executed anywhere in Scotland outside the territorial limits of Admiralty jurisdiction, assuming (which itself is unclear) that these limits are still in force.

(c) Summary of existing law on territorial limits of Admiralty jurisdiction

3.151 From the foregoing, it is evident that the definition of the territorial limits on the landward side of the Admiralty jurisdiction of the Scottish courts for the purposes of determining:

> first, the place where a cause of action must arise in order that the action must be treated as an Admiralty action, and
>
> second, the place where an Admiralty arrestment of a ship and her cargo are competent and the ordinary diligences of arrestment and poinding are not competent,

is extremely uncertain and unsatisfactory. The position may be summarised as follows.

(1) The common law rule conferring Admiralty jurisdiction on land within Scotland below the flood-mark[1] has never been abrogated by statute and may be still in force.

(2) It is unclear whether the statutory definition of the waters subject to Admiralty jurisdiction in the Admiralty Court Act 1681 still has effect.[2]

(2a) On one view the repeal of the 1681 Act by the Statute Law Revision (Scotland) Act 1964 has had the effect of repealing the territorial limits specified in the 1681 Act. The effect of such a repeal (on this view) seems to be that Admiralty actions in Scotland can now be brought in respect of causes of action wherever arising in Scottish (tidal and non-tidal) waters, except where the substantive law relating to particular causes of action determines the place where the cause of action must arise.[3] On this view, Scots law may have reached by a different route the same position as English law in terms of the Supreme Court Act 1981, s 20(7) as construed in The Goring.[4] The enactments on salvage[5] are examples of substantive law rules determining the place of a cause of action. (These enactments are themselves not consistent and uniform[6]). Whether common law rules on other Admiralty causes of action must be construed as requiring a maritime location (eg the doctrine of general average which applies only to "maritime adventures") is uncertain in the absence of judicial decisions considering each of these causes of

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[1] See para 3.121 above.

[2] See paras 3.127 to 3.130 above.

[3] See para 3.128 above.

[4] [1988] 1 AC 831 (HL).

[5] Merchant Shipping Act 1894, s 546 (as amended by the Merchant Shipping Act 1988, Sch 5, para 3) (salvage of ships); Merchant Shipping Act 1894, s 544 (salvage of life): see paras 3.143 to 3.144 above.

[6] The 1894 Act s 546 refers to "tidal waters" and the 1894 Act s 544 refers to "British waters" or, in the case of British vessels, "elsewhere".

action.[1]

(2b) On another view, the Statute Law Revision (Scotland) Act 1964 is to be construed as not changing the pre-existing law and the application of the territorial limits in the 1681 Act is "saved" by the provisions of the Court of Session Act 1830, s 21 and the Sheriff Courts (Scotland) Act 1907, s 4.[2] On this view, the 1681 Act limits apply except where the substantive law relating to particular causes of action (notably the enactments on salvage) determine the place where the cause of action must arise. This view is also unsatisfactory since it means that the 1681 Act has been removed from the Statute Book but its effect is still there and it is increasingly difficult to trace.[3]

(3) Even if the territorial limits in the 1681 Act are still in force, the statutory terms of the definition of those limits require modernisation.[4]

(4) The particular Admiralty causes of action affected by the territorial limits (if still in force) are also somewhat unclear.[5] Those limits do not apply to the locus contractus[6] but do apply to the place where damage to a ship or

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1 See para 3.128 above.

2 See para 3.129 above.

3 Idem.

4 See paras 3.157 to 3.162 below.

5 See paras 3.131 to 3.133 above.

6 Lord Ivory's Notes to Erskine Institute I, 3, 33; Bell Commentaries vol 1, p 546: see para 3.132 above.

cargo is done.[1]

(5) In principle, the statutory territorial limits in the 1681 Act, if still in effect, should apply to the place where an Admiralty arrestment against a ship, or cargo on board ship, may be executed. But there are judicial decisions[2] that those limits do not apply to an arrestment of a ship under construction on the stocks or dry land outside those limits. It is unclear whether the effect of those decisions is that an Admiralty arrestment may be executed anywhere in Scotland outside those territorial limits, whether in inland non-tidal waters or on dry land, and the law requires clarification.[3]

(6) In the case of an arrestment in rem of cargo encumbered by a maritime lien, it is unclear how the maritime lien is to be enforced in a case where the cargo has been landed and is in the possession of the owner, and thus is not covered by the rules on the mode of arrestment in RC 140(b).[4]

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[1] Walker v Campbell 15 June 1803 FC; Mor 7537; Boettcher v Carron Co (1861) 23 D 322: see paras 3.131 and 3.133 above.

[2] Balfour v Stein 7 June 1808 FC; Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC.

[3] See paras 3.145 to 3.149 above.

[4] See para 3.81, head (iii), above.

(d) Reform of territorial limits of Admiralty jurisdiction applicable to place where an Admiralty cause of action arises

3.152 We recognise that there may be a case for enacting a new definition of the rules determining the place where an Admiralty cause of action must arise. In England and Wales, as we have seen, it was held in The Goring[1] that the Admiralty jurisdiction of the English courts does not extend to non-tidal waters for the purposes of the law of salvage of a ship. In that case, it was not necessary for the House of Lords to define the general territorial limits of the English High Court's Admiralty jurisdiction on the landward side, since the case was concerned only with salvage of property.

3.153 We propose[2] below that an Admiralty arrestment of a ship should be competent anywhere in Scotland, but we do not at present propose a similar extension of Admiralty jurisdiction for determining the place where a cause of action must arise. In this Discussion Paper, we are concerned with diligence and only incidentally with Admiralty causes of action. Further, any long term proposals for reform should properly be advanced by an advisory body with United Kingdom terms of reference since it seems to be agreed on all sides that, other things being equal, maritime law should be the same throughout the United Kingdom.

3.154 Moreover so far as salvage services are concerned, reform may be less urgent in Scots law than in English law. In The Goring, a main argument for extending Admiralty jurisdiction in respect of salvage services to non-tidal waters was based on public policy. For example, Sheen J. remarked[3]:-

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[1] [1988] 1 AC 831 (HL).

[2] Proposition 40(2)(para 3.168).

[3] The Goring [1987] QB 687 at p 693.

> "If a ship or her cargo is in danger in non-tidal waters it is highly desirable, as a matter of public policy, that other ships should be encouraged to go to her assistance without hesitation".

Sir John Donaldson could find no rational basis for confining the cause of action to tidal waters; he observed[1]:

> "...I can see no sense in a cause of action which will remunerate the salvors of an ocean-going vessel inward bound for Manchester up to the moment when the vessel enters the Manchester Ship Canal, but no further. Some of the perils facing the vessel in the canal may be different from those facing it at sea, but many, such as fire, will be the same. The need to encourage assistance otherwise than under contract may be greater at sea, but the skills required of the salvors will be the same or at least similar. The vessel is not intended to sail only on tidal waters. The voyage over tidal and non-tidal waters is a single maritime adventure and should not attract wholly different rights and obligations by reference to the tidality of the water in which the vessel is for the time being sailing".

This argument has perhaps more force in England, where(apart from a quantum meruit claim in some cases), there is in general no common law alternative to a salvage claim,[2] than in Scotland where the salvor may have a claim, under the doctrine of unjustified enrichment, for recompense for the amount by which

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[1] Ibid at pp 706-707.

[2] See eg Falcke v Scottish Imperial Insurance Co (1886) 34 Ch D 234 at p 248 per Bowen L J; cf Goff and Jones, The Law of Restitution (3rd edn; 1986) pp 337-338; F D Rose, "Restitution for the Rescuer" (1989) 9 Oxford Journal of Legal Studies 167.

the defender is enriched by the salvage services,[1] or a claim as "gestor" under the law of negotiorum gestio for recovery of his "useful expenses",[2] or a quantum meruit claim, depending on the circumstances. It follows that reform is not so urgent as to require separate Scottish legislation extending Admiralty jurisdiction to non-tidal inland waters.

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[1] See eg Lord Carmont's article on "Salvage" in Encyclopaedia, vol 13, p 190, para 482. The elements of a claim in recompense are (1) the pursuer must have suffered loss; (2) without intention of donation, and (3) not with a view to benefit himself; (4) the defender must have been enriched; (5) recompense must be just and equitable in all the circumstances; and (6) there must normally be no other remedy available to the pursuer. A seventh element, that the pursuer must have acted under error of fact, is probably not required. See generally Lawrence Building Co Ltd v Lanark C C 1978 SC 30 especially at pp 35-38 per Lord Maxwell (Ordinary); Varney (Scotland) Ltd v Lanark TC 1974 S C 245; Trade Development Bank v Warriner and Mason 1980 SC 74; Cliffplant Ltd v Kinnaird 1981 SC 9 at p 28; City of Glasgow D C v Morrison McChlery and Co 1985 SC 52.

[2] The elements of the gestor's claim under the doctrine of negotiorum gestio are (1) there must be administration of another's affairs (negotia), which may be a single act preserving property; (2) the administration must be unauthorised by the benefited party (dominus negotii); (3) the gestor's act of administration must be useful to the dominus when done (utiliter coeptum); (4) the gestor must act from motives of "calculated altruism", intending to benefit the dominus but also intending to claim reimbursement for his expenses; and (5) the dominus must be absent, or ignorant of the administration, or incapax. See R D Leslie, "Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor" [1983] Juridical Review 12.

3.155 As an interim measure, to achieve cross-border harmonisation pending a possible review of the law in all parts of the United Kingdom, it might be provided by statute that the Scottish courts have jurisdiction in Admiralty causes "wherever arising" but subject to any enactment or rule of law determining the place where a cause of action of a particular type (eg salvage) must arise if the action is to be treated as an Admiralty action. We doubt whether such a provision would be worthwhile because it would simply replace the uncertainty of Scots law with the uncertain provisions of English law. We invite views on this matter however.

(e) Reform of territorial limits of Admiralty jurisdiction applying to the place where Admiralty arrestment executed

3.156 Options for reform. In relation to the territorial limits on the competence of Admiralty arrestments, it seems to us that there are two options for reform. The first would be to enact a new definition of the territorial limits on the competence of arrestments broadly on the lines of the Admiralty Court Act 1681. The second option would be to make it clear by statute that Admiralty arrestments of ships are competent anywhere in Scotland.

3.157 First option: revision of 1681 Act limits. We have seen that the Admiralty Court Act 1681 defines the territorial limits of the Admiralty jurisdiction of the Scottish courts as follows:

> "the seas and... all ports, harbours, or creiks of the same and ... fresh waters or navigable rivers below the first bridges or within the flood marks so far as the same does or can at any time extend".

There is an absence of case law construing this definition but it appears to cover four categories of waters: (a) the seas; (b) all ports, harbours or creeks of the sea; (c) fresh waters or navigable rivers below the first bridges; and (d) freshwaters or navigable rivers within the flood- marks so far as the same does or can at any time extend.

3.158 As regards (a) the seas, for the purposes of the execution of an arrestment, the place of execution must be at a harbour or other recognised anchorage and this must be within 12 mile limit of territorial waters,[1] as delimiting the jurisdiction of the Scottish courts.

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[1] Territorial Sea Act 1987.

3.159 The definition is in terms of waters but the 1681 Act was construed as not altering the Admiralty Court's historic jurisdiction in land below the flood-mark.[1] The expression "flood-mark" in a bounding feu-contract has been declared to be the high-water mark of ordinary spring tides,[2] in other words the line at which the high-water level of the tide reaches its maximum in the lunar cycle.[3]

3.160 The flood-mark in the definition is applied to fresh-waters or navigable rivers, and there is added the words so far as "the same (ie the flood-mark) does or can at any time extend". These additional words seem to introduce an undesirable measure of uncertainty since they appear to have reference to peculiar conditions eg extra-ordinary spring tides where an increased wind from the sea coupled with reduced down-stream pressure of freshwater as a result of low rain-fall may move the flood-mark or tidal limit upstream a considerable distance. Ordnance Survey maps have since last century shown on rivers, by the letters "NTL" (short for "normal tidal limits") the highest point to which ordinary spring tides flow in rivers.[4] These can be somewhat remote from the sea but would be convenient as demarcating the limits of the maritime territory for the purpose of Admiralty arrestments, if a line of demarcation has to be drawn.

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[1] See para 3.121 above.

[2] Berry v Holden (1840) 3D 205.

[3] See Shorter OED, s v "spring-tide".

[4] Eg on the River Forth, the specified normal tidal limit is at a weir near Craigforth Mill just west of Stirling; on the Clyde it is at Carmyle; on the Tay it is near Scone Palace just north of Perth; and on the Ness it is just above Inverness.

3.161 In the expression "fresh waters or navigable rivers below the first bridges", the reference to the first bridges may have been intelligible at a period in history when sea-going ships were invariably sailing ships with relatively tall masts and the arches of bridges were generally so low as to prevent passage of such ships. These conditions no longer apply.

3.162 In the light of these comments, we suggest that the territorial limits of Admiralty jurisdiction might be defined as extending to:

(1) the sea;

(2) any tidal waters within Scotland, the expression "tidal waters" being defined to mean:

(a) any waters within the ebb and flow of the tide at ordinary spring tides; and

(b) the waters of any dock which is directly, (or by means of one or more other docks) indirectly, connected with such waters; and

(3) the shores of the sea, and of any tidal waters, within Scotland, below the high water mark of the tide at ordinary spring tides.

The foregoing definition would determine the place where an Admiralty arrestment of ship or cargo must be arrested subject to

certain provisos and qualifications. Para (1) would be subject to the proviso that an Admiralty arrestment of a ship is not competent outside Scottish territorial waters, or in the case of a sheriff court warrant for arrestment, the boundaries of a sheriffdom. Para (2) would get rid of the anachronistic reference to the "first bridge" in the 1681 Act and, in the definition of "tidal waters", para (a) replaces the unsatisfactory reference in that Act to the "flood mark...so far as the same does or can at any time extend". Para (b) would allow an arrestment where a ship is in a wet dock in a port or harbour where the waters are not tidal, being enclosed and cut off from the sea. The definiton of "tidal waters" is borrowed from the definition inserted in the Merchant Shipping Act 1894, s. 546, by the Merchant Shipping Act 1988, Sch. 5, para. 3.[1] Para (3) would replace the common law rule limiting Admiralty jurisdiction to the shores of the sea and of tidal waters below the flood-mark but would substantially reproduce the effect of that rule. As a corollary of these proposals, ships outside the territorial limits would be attachable by poinding in execution or, if our proposals in Part IV are implemented, by interim attachment on the dependence.

3.163 Preferred option: Admiralty arrestment generally competent anywhere in Scotland. We think, however, that it would be preferable if it were provided by statute that an Admiralty arrestment, whether in rem or on the dependence of an Admiralty action in personam or in execution of a decree in an action in personam of a ship or her cargo, may be competently executed wherever the res is situated within Scotland, whether in tidal or non-tidal waters, or on land below or above the flood-mark.

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[1] See para 3.140 above.

3.164 It would be unfortunate if a vessel could escape arrestment simply by moving from tidal waters to non-tidal waters, or in the case of smaller vessels, by being taken ashore above the flood-mark. It would seem to us to be a retrograde step to introduce an artificial barrier to enforcement against ships by re-enacting in modern form statutory provisions which may no longer be in effect, whose primary purpose was to delimit the jurisdiction of the Admiralty Court which no longer exists as a separate court, and which, as the old cases on arrestments of ships under construction show, may not have applied to Admiralty arrestments (although that is uncertain).

3.165 We note that, in England and Wales, the general rule is that in an Admiralty action in rem, the res may be arrested if it is within the territorial jurisdiction of the court,[1] and we understand that "jurisdiction" for this purpose has reference to anywhere on land or in territorial waters. The Admiralty Marshal has informed us that he has for example arrested a vessel in a car park in an inland town (West Bromwich) and another vessel at the Boat Show. As regards cargo, he may arrest cargo which has been landed (if it can still be identified) and has for example arrested fuel oil pumped ashore and in oil tanks in a refinery by closing down the tanks. We see no reason why a pursuer in a Scottish Admiralty action should not have equally extensive rights of arrestment.

3.166 The foregoing proposal would apply to an arrestment in rem of cargo. This would require an amendment of RC 140(b)

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[1] See Supreme Court Practice, General Note to RSC, Order 75, r 5 (warrants of arrest): see also Order 75, r 11.

which, as we have seen,[1] provides for an arrestment in rem of cargo which has been landed or transhipped to be effected by placing the schedule of arrestment in the hands of the custodier for the time being (but only insofar as it has not been delivered to the owner thereof, or to his agents). No provision however is made by RC 140(b) as to the mode of executing an arrestment in rem against cargo where the cargo has been delivered to its owner or the owner's agents. The reason for this omission is not clear. A maritime lien over a maritime res (including cargo) follows the res into whose hands so ever it comes and there is no rule of law stating that the lien flies off when the cargo is landed and comes into the possession of the owner or his agents. We understand that in England the Admiralty Marshal would arrest cargo encumbered by a maritime lien anywhere on dry land in anyone's hands if the cargo could be separately identified. We suggest that RC 140(b) should be amended to provide for an arrestment in rem in the hands of the owner or his agents where the cargo has been landed. RC 140(b) also provides that if the cargo has been landed on to the quay or into the shed of a port or harbour authority, the arrestment in rem may be executed by delivery of the schedule to the harbour master. This is presumably an alternative mode of execution to arrestment in the hands of the custodier and not a restriction of arrestment in rem of landed cargo to arrestment at the places specified. So construed, the provision seems useful.

3.167 We think however that an arrestment on the dependence of an Admiralty or ordinary action in personam,[2] or in execution of a decree for payment in an action in personam (whether the action is an Admiralty action or an ordinary action for payment), of cargo in the owner's possession should only be competent while

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[1] See para 3.81, head (iii).

[2] Cargo on board a ship may be arrested on the dependence of an action which is not an Admiralty action: see Svenska Petroleum AB v HOR Ltd 1982 SLT 343; 1983 SLT 493; 1986 SLT 513.

the cargo is on board the ship, as under the existing law and RC 140(b). Where cargo has been landed, it loses its character of ship's cargo and there is no longer any reason for treating it as liable to an Admiralty arrestment in the owner's possession. In the owner's possession on land, the cargo would be liable to interim attachment on the dependence if our proposals in Part IV were implemented and, if decree for payment had been granted, it would be liable to poinding.

3.168 Views are invited on the following propositions.

(1) **The legal definition of the territorial limits on the landward side of Admiralty jurisdiction for the purpose of determining the place where a cause of action must arise if the action is to be treated as an Admiralty action, is uncertain in Scotland and (it is thought) England and Wales. Any long term proposals for legislative reform, however, should properly be advanced by an advisory body with United Kingdom terms of reference.**

(2) **Subject to paras (3) and (4) below, it should be provided by statute that an arrestment of a ship or her cargo, whether:**

(a) **in rem; or**

(b) **on the dependence of an Admiralty or ordinary action in personam; or**

(c) **in execution of decree in an action in personam (whether an Admiralty action or an ordinary action for payment),**

may be competently executed wherever the ship or cargo is situated within Scotland, whether in tidal or non-tidal waters or on land below or above the flood-mark.

(3) However, an arrestment of a ship's cargo in the owner's possession:

(a) on the dependence of an Admiralty or ordinary action in personam; or

(b) in execution of decree in an action in personam (whether an Admiralty action or an ordinary action for payment),

should only be competent while the cargo is on board the ship, without prejudice to the pursuer's or creditor's right to arrest cargo, which has been landed or transhipped, in the hands of a third party in terms of RC 140(b).

(4) Nothing in the foregoing proposals should affect the rule that the arrestment of a ship which is afloat may be executed while the ship is at anchorage and not while she is on passage.

(Proposition 40).

(5) Subjects attachable by Admiralty arrestments: ships, vessels, aircraft and hovercraft

(a) The definition of 'ships' or 'vessels' attachable by Admiralty arrestments

3.169 There is surprisingly no authoritative Scottish common law definition of what constitutes a "ship" or "vessel" for the purposes of Admiralty arrestments whether in rem or on the dependence or in execution. The Scots cases on Admiralty arrestments which we have identified (which are too numerous to cite) have all concerned what appear to be sea-going ships.

3.170 Legislation on Scots Admiralty arrestments. So far as primary and subordinate legislation is concerned, the statute requiring the introduction in Scotland of a new form of action in rem refers to "a ship",[1] and the Rules of the Court of Session on Admiralty Causes[2] also use the term "ship", all without definition. The Administration of Justice Act 1956, s. 47, in restricting the competence of Admiralty arrestments on the dependence and in rem, also uses the term "ship" which is defined in section 48(1) as follows:

> "'ship' includes any description of vessel used in navigation not propelled by oars".

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[1] Administration of Justice Act 1933, s 17 (iii) (repealed) re-enacted in the Court of Session Act 1988, s 6(iii): "the enforcement of a maritime lien over a ship by an action in rem directed against the ship". Section 6(iv) of the 1988 Act (re-enacting s 17(iv) of the 1933 Act) uses the word "vessel" in referring back to s 6(iii).

[2] RC 135-147 passim.

This is the same definition as appears in the Merchant Shipping Acts, currently the Merchant Shipping Act 1894, s. 742. It contrasts with the wider definition of "vessel" in the same section:

> "'vessel' includes any ship or boat, or any other description of vessel used in navigation".[1]

3.171 Meaning of 'ship' in Merchant Shipping Acts. It should be noted that the definition of 'ship' in the Merchant Shipping Acts is inclusive rather than exhaustive, and has therefore to be construed as if it extended the meaning of the word 'ship'.[2] The definition has been frequently construed in reported cases[3] (though not in the context of its application by the 1956 Act to arrestments). Some of the cases are irreconcilable. In particular, there is a conflict of authority on the question whether, in order to be a ship in the statutory sense, the vessel has to be sea-going. In the Scots case of Oakes v. Monkland Iron Co.[4], it was held that a fireman on a steam canal-barge used only for traffic on the Forth and Clyde Canal was not a "seaman", (and therefore not excluded from the provisions of Employers Liability Act 1880). The court construed the words "seamen" and "ship" and their

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1 A vessel which has just been launched and is waterborne is a vessel within the Merchant Shipping Acts, though incapable of self-propulsion or self-direction, if she was constructed for the purpose of navigation: The "St Machar" (1939) 64 Ll L R 27 (Ct of Session)(OH) at p 31; affd (1939) 65 Ll L R 119 (Ct of Session) at p 125.

2 Ex parte Ferguson (1871) LR 6 QB 280 at p 291 per Blackburn J.

3 For a review of the cases, see Temperley Merchant Shipping Acts (7th edn; 1976) p 277. (British Shipping Laws Series, vol 11).

4 (1884) 11 R 579.

inter-locking definitions in the Merchant Shipping Act 1854, s. 2[1]. Lord Justice-Clerk Moncreiff observed[2]:

> "A ship in ordinary language means a vessel which goes to sea..."

and later continued:[3]

> "A ship is defined in the Merchant Shipping Act 1854, 'every description of vessel used in navigation not propelled by oars'. But 'used in navigation' means here, as I think clearly, used in navigating the seas. In the Merchant Shipping Act of the preceding year, 1853, the word 'ship' was defined more accurately perhaps, 'every seagoing vessel', and probably in the Act of 1854 the definition was altered to exclude boats propelled by oars only. But as far as I can read the Merchant Shipping Acts, they are all applicable to seagoing men plying their vocation in sea-going vessels".

Though the case concerned an artificial inland water-way, the Lord Justice-Clerk emphasised that the same principle applied to "great natural inland waterways" eg "a flotilla on an inland lake".

3.172 To a similar effect is the judgment of Blackburn J in Ex parte Ferguson (1871)[4] in which he observed:

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[1] "'Seamen' shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship". "'Ship' shall include every description of vessel used in navigation not propelled by oars".

[2] (1884) 11 R 579 at p 583.

[3] Ibid at p 584.

[4] (1871) LR 6 QB 280 at p 291.

> "Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them,[1] and it would be monstrous to say that they are not ships. What, then, is the meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship'. I do not mean that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purpose of the Act".

In that case a fishing coble, 24 feet long, of 10 tons burden, with removable masts for sailing, which used oars to go in and out of harbour, the oars being auxiliary to sails, and which went 20 or 30 miles to sea almost entirely with sails and stayed there days and nights, was a sea-going vessel and therefore a ship. In The C S Butler[2], Sir Robert Phillimore said:

> "...the criterion as to whether a vessel falls under the category of ship mentioned in that Act, is, whether the vessel be one whose real habitual business is to go to sea; if so, though propelled by oars as well as sails, it is a ship within the meaning of the Act".

In Mayor of Southport v. Morriss[3] a launch of 3 tons burden used for carrying passengers on pleasure trips round an artificial lake or pleasure-pond half a mile long by 180 yards wide was held not

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[1] In the report in (1870) 40 LJ QB 105 at p 110, Blackburn J is reported as saying: "The vessels which came over in the Armada, with perhaps a thousand men on board, were rowed by hundreds of slaves. Yet no one could say they were not ships... If the absence of oars were the test of a ship, this would take in the case of river steamers, yet there are many such steamers plying between South Shields and Newcastle which never go to sea".

[2] (1874) L R 4A &E 238 at p 241 following Ex parte Ferguson (supra).

[3] [1893] 1 QB 359, construing MSA 1854, s 2, definition of "ship".

to be a "ship" in the statutory sense, on the ground that "navigation is a term which, in common parlance, would never be used in connection with a stretch of water half a mile long".[1]

3.173 The decision in Ex parte Ferguson was distinguished and "explained" (or, in effect, disapproved) in The Mac[2], in which it was held that the inclusive definition of ship in MSA 1854, s. 2, did not exclude other meanings of the word (so far agreeing with Blackburn J) and that a hopper barge used for dredging, which (though having a bow, stern and rudder) did not propel itself but was always towed, was a ship both in the normal meaning of the term and in the statutory sense. Cotton L. J.[3] remarked:

> "I think that the hopper-barge is a "ship", both within and without the interpretation clause. "Ship" is a general term for artificial structures floating on the water; this is plain upon looking at the meanings given in Johnson's Dictionary; and it is to be observed that one of the meanings of "boat" is therein stated to be "a ship of a small size". I think that the proper meaning is "something hollowed out". Some expressions of Blackburn, J., in Ex parte Ferguson may appear to support a different view; that learned judge seems at first sight to have been of opinion that a "ship" meant a sea-going vessel; but I think that the remarks which he made must be read with reference to the subject-matter before him, and that he was merely explaining that the vessel in question was a "ship". It is plain to my mind, that in order to be a "ship" within the Merchant Shipping Act, 1854, a vessel need not be sea-going: it is only necessary to refer to s. 19 of that statute which provides that British ships must be registered, except "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of such ships are resident". I think that this shews

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[1] Ibid at p 361. Distinguished in Weeks v Ross [1913] 2 KB 229.

[2] (1882) 7 PD 126 (jurisdiction of English justices to award salvage).

[3] Ibid at p 131.

> that the hopper-barge was a "ship" within the Act. The question cannot depend on the circumstance whether she carries a cargo from port to port. She was propelled by towing, and she carried mud with a crew on board". (emphasis added).

The case was applied in later cases involving a similar hopper-barge used for dredging[1] and dumb barges towed by a tug, used to carry goods on the Thames.[2] A sprit-sail barge used to navigate in the estuary and upper tidal waters of the Thames was held to be a ship, [3] it being observed[4] that the word "ship" may include a vessel used only on a river. A pontoon carrying a crane, from which the crane was removed and which was used for the time being for the carriage of goods in tow of a tug, was held to be a vessel.[5] A floating structure or 'blower boat' used to pump sludge, raised from the sea-bed by dredgers, from barges through a pipe to the sea-shore, was held to be a 'ship' since it had a deck, ladders, compression hatches and other equipment characteristic of a ship, and though it was flat-bottomed and had no means of self-propulsion, it was moved by tugs about the sea from time to time as occasion required.[6]

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[1] The Mudlark [1911] P 116. (decree limiting liability).

[2] The Harlow [1922] P 175 (decree limiting liability).

[3] Corbett v Pearce [1904] 2 KB 422 (distinguishing at p 426 Oakes v Monkland Iron Co, supra).

[4] At p 428 per Kennedy J.

[5] Marine Craft Construction Ltd v Erland Blomqvist (Engineers) Ltd [1953] 1 Ll L R 514 (implied warranty of seaworthiness under Marine Insurance Act 1906).

[6] Cook v Dredging and Construction Co Ltd [1958] 1 Ll L R 334. (whether a "ship" within the meaning of the Docks Regulations).

3.174 On the other hand, a floating gas-lighted beacon, shaped like a boat but neither intended nor capable of being navigated but permanently moored in the sea to direct the course of vessels[1], and a large floating landing stage, free to move up and down with the tide on its chains, but otherwise permanently fixed,[2] were both held not to be vessels.

3.175 Meaning of 'sea-going ship'. In various contexts, the Merchant Shipping Acts use the expression "sea-going ship".[3] It has been held that a "sea-going ship" in the statutory sense is a ship which does in fact go to sea and does not include a ship which, though capable of going to sea, does not in fact do so.[4] Thus in an English case, it was held that ships which make their entire voyages in rivers which are wholly or partly tidal, eg a ship sailing down the Mersey to Liverpool, are not treated as sea-going.[5] Again in a sheriff court case it was held that a ship sailing on the Firth of Clyde from Greenock to Campbeltown was a sea-going ship, since the sea denoted all waters from the river mouth outward and included an inlet of the sea such as the Firth of Clyde.[6]

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1 The Gas Float Whitton (No 2) [1897] AC 337 (jurisdiction of Admiralty Court over salvage).

2 The Craighall [1910] P 207 (CA) (Rules of Supreme Court on "preliminary acts").

3 Merchant Shipping (Safety Convention) Act 1949, s 3(2)(a); Merchant Shipping Act 1964, s 2(3)(a); Merchant Shipping Act 1970, s 96(1).

4 Salt Union Ltd v Wood [1893] 1 QB 370; applied in Turbine Steamers Ltd v McLaughlin 1923 SLT (Sh Ct) 20.

5 Salt Union Ltd v Wood [1893] 1 QB 370.

6 Turbine Steamers Ltd v McLaughlin 1923 SLT (Sh Ct) 20.

3.176 Given that under our proposals Admiralty arrestments should apply to vessels sailing in tidal and non-tidal waters, it would be wrong to define the word "ship" as "sea-going ship" for the purpose of such arrestments.

3.177 Meaning of "ship" in English Admiralty jurisdiction. At one time the Admiralty jurisdiction of the English High Court was exercisable, at least for certain purposes, only in respect of any ship or sea-going vessel"[1] but this was subsequently extended by omitting the adjective "sea-going".[2] Thereafter, for a period, the enactments governing the Admiralty jurisdiction of the High Court in England and Wales[3] defined "ship" in the same way as did the Merchant Shipping Acts, ie as including "any description of vessel used in navigation not propelled by oars". However, in the (inclusive) definition of "ship" in the provisions of the Administration of Justice Act 1956,[4] and consolidating provisions,[5] defining the Admiralty jurisdiction of the English High Court, the words not "propelled by oars" have been omitted. At one time "ship" in the English county court Admiralty jurisdiction was defined as including "any description of vessel whatsoever"[6] though since 1959 it has been defined in the same way as in the High Court jurisdiction.[7] On the other hand, as we have seen, in the Scottish provisions of the Administration of Justice Act 1956,[8] the same inclusive definition as in the Merchant Shipping Acts is enacted, ie. using the formula "not propelled by oars".

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1 Admiralty Court Act 1840, s 6.

2 Wreck and Salvage Act 1846, s 20.

3 Admiralty Court Act 1861, s 2; Supreme Court of Judicature (Consolidation)Act 1925, s 22(3).

4 S 8(1).

5 Supreme Court Act 1981, s 24(1).

6 County Courts Act 1934, s 56(7).

7 County Courts Act 1984, s 147(1), re-enacting same definition in County Courts Act 1959, s 201.

8 S 48(f).

3.178 Proposed definition. It is not at all clear why this cross-border difference was introduced. It may be that, in the English provision, the reference to "propelled by oars" was omitted to avoid the conflict of opinion which arose in The Champion,[1] which concerned the Admiralty jurisdiction of the county courts in respect of a collision involving a dumb barge.[2] Merriman P took the view that the dumb barge was not a ship because the test was whether the barge was normally propelled by oars, not whether she was propelled by oars at the material time, whereas Bateson J took the view that the test was whether she was being propelled by oars at the time of the collision. Since it has been held that vessels which are sometimes propelled by oars (eg. to go in and out of harbour) may nevertheless be 'ships' within the statutory definition,[3] and since the definition is inclusive rather than exhaustive, the change in definition is likely to be unimportant.It has been observed[4] that whereas a dumb barge propelled by oars is not a ship for the purpose of the Merchant Shipping Acts, it is nonetheless a ship for the purposes of English Admiralty jurisdiction.[5] However dumb barges have been treated as 'ships' for the purposes of the Merchant Shipping Acts[6] and though sometimes propelled by oars would seem still to be 'ships' for those purposes.

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1 [1934] P 1.

2 ie a barge without mast or sail, as a Thames lighter (Shorter OED).

3 Ex parte Ferguson (1871) LR 6 QB 780 at p 291.

4 Thomas p 189.

5 Cf Gapp v Bond (1887) 19 QBD 200.

6 The Harlow [1922] P 175.

3.179 We think that the definition should be the same for Scots Admiralty jurisdiction as for English Admiralty jurisdiction, given that the difference is small in any event.

3.180 In view of the extended meaning given to "ship" in the Merchant Shipping Acts, and by inference in the legislation on Admiralty jurisdiction, it seems likely that a floating oil-rig capable of being towed around the seas from place to place as occasion might require would be treated as a "ship" for the purposes of Admiralty jurisdiction and arrestments. On the other hand, an offshore oil platform or similar offshore installation permanently affixed to the sea-bed would fall outside the definition. We assume that these results are satisfactory.

3.181 We propose:

> **For the purposes of Admiralty jurisdiction and arrestments under Scots law, the concept of a "ship" should be defined as including "any vessel capable of navigation", omitting the qualification "not propelled by oars". The concept of "sea-going ship" should not be used.**

(Proposition 41).

(b) Extension of Admiralty jurisdiction to aircraft

Legislation on salvage of aircraft

3.182 In an important early case in Aberdeen sheriff court, it was held that under British Admiralty common law, a British ship rescuing an aircraft from the perils of the sea is not entitled to salvage because the aircraft is not within the category of ships, vessels, or boats,[1] and it makes no difference that the aircraft is

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[1] Watson v RCA Victor Co Inc (1934) 50 Ll L R 77 (Sheriff court).

a sea-plane.[1] The Air Navigation Act 1920, s.11, as originally enacted, applied the law of wreck and salvage to aircraft but this was construed as confined to aircraft wrecked within the territorial jurisdiction.[2] In 1936, the 1920 Act, s. 11 was extended to cases where the salvage services were rendered outwith the territorial jurisdiction.[3] These provisions were consolidated in 1949 and again in 1982.[4] The Civil Aviation Act 1982, s. 87(1) provides:

> "87.- (1) Any services rendered in assisting, or in saving life from, or in saving the cargo or apparel of, an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel".[5]

Subsection (1) relates to salvage services rendered to an aircraft. Where salvage services are rendered by an aircraft, subsection (2) provides that the owner of the aircraft shall be entitled to the same reward for those services as he would have been entitled to if the aircraft had been a vessel.

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1 Idem, followed in Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd [1943] 1 K B 161, in which it was held that a flying boat was not a ship or vessel within the meaning of an insurance policy.

2 See the Watson case, supra.

3 Air Navigation Act 1936, Sch 5.

4 Civil Aviation Act 1949, s 51(1); Civil Aviation Act 1982, s 87.

5 There seems to be an overlap between this provision and the Aircraft Wreck and Salvage Order 1938, (S R & O 1938/136; Rev vol 1, p 1329) article 2, which applies inter alia the Merchant Shipping Act 1894, s 546, to aircraft.

3.183 Section 87(1) applies to aircraft "in, on or over the sea". We understand that an example of salvage of an aircraft "over the sea" occurred some time ago when an RAF Harrier VTOL (or 'jump-jet') aircraft ran out of fuel and managed to land on top of containers on a Spanish ship bound for Las Palmas.[1]

3.184 Maritime lien for salvage of aircraft enforceable by arrestment in rem. In England, the provisions of section 87(1) of the 1982 Act are generally construed as indirectly creating a maritime lien for salvage.[2] This result is said to be supported by other statutory provisions, notably section 21(3) and (5) of the Supreme Court Act 1981, which do not apply in Scotland.

3.185 Nevertheless it is thought that in Scotland section 87(1) has to be construed as indirectly creating a maritime lien for salvage. Section 87(4) (consolidating earlier provisions) enables the making of an Order-in-Council directing that the provisions of any Act relating to inter alia wreck and salvage shall apply to aircraft as they apply to vessels. The Aircraft (Wreck and Salvage) Order 1938[3] (made under earlier provisions and now having effect as if made under s. 87(4) of the 1982 Act[4]) provides in articles 4 to 6:

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[1] Of this case, it has been observed: "Contemporary press reports suggested that the owners of the Spanish vessel were exerting their possessory maritime lien for salvage and refusing to return the aircraft until suitable security for a salvage claim had been arranged. It is understood that the claim was settled for a substantial sum reflecting both the high value of the property salved, and its likely total loss if it had not been salved by the Spanish vessel". See R Knox, "Collisions and Salvage", para 2.3, in the Law Society of Scotland, PQLE Maritime Law Seminar Papers (unpublished, 23 February 1989) at p 48.

[2] See eg Thomas, pp 28, 160 ff.

[3] SR&O 1938/136 (Rev vol 1, p 1329).

[4] Civil Aviation Act 1949, s 70(2); Interpretation Act 1978, s 17(2)(b).

"4. Every court having Admiralty jurisdiction shall have jurisdiction over claims under section 11 of the Air Navigation Act 1920, and this Order.

5. The jurisdiction conferred by the last preceding article may be exercised either by proceedings in rem or by proceedings in personam...

6. The powers of all such courts and the rules of practice and procedure for the time being in force in regard to the Admiralty jurisdiction of those courts shall apply and extend to claims under section 11 of the Air Navigation Act 1920, and under this Order".

The references in articles 4 and 6 to section 11 of the Air Navigation Act 1920 must now be construed as, or as including, a reference to section 87 of the 1982 Act,[1] ie a claim under s. 87(1) in respect of salvage of aircraft. Accordingly,in Scotland an action in rem in respect of salvage of aircraft is competent by virtue of article 4 and the power to grant warrant to arrest in rem is competent by virtue of article 6. Thus although the Rules of the Court of Session relating to Admiralty Causes[2] nowhere mention aircraft, those rules apply to aircraft as they apply to vessels in the case of salvage claims under section 87 of the Civil Aviation Act 1982.

3.186 No statutory provision is made defining the property encumbered by a maritime lien for salvage services rendered in respect of aircraft. It has been suggested that the lien will encumber the aircraft and its cargo and apparel since these are mentioned in s. 87(1), and that it also encumbers freight as being included by implication from the reference to aircraft.[3] Any legislation clarifying this matter should be in a United Kingdom Act, and we make no proposals here.

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[1] See Interpretation Act 1978, s 17(2)(a); Civil Aviation Act 1949, s 70(5).

[2] RC 135-147.

[3] Thomas, p 161, citing by way of analogy The Fusilier (1865) B & L 341.

Admiralty arrestment on the dependence or in execution of aircraft

3.187 It seems that section 87(1) of the Civil Aviation Act 1982 and the Aircraft (Wreck and Salvage) Order 1938, articles 4 to 6, also have the effect that it is competent to raise an action in personam, and to execute arrestments on the dependence or in execution, all in accordance with Admiralty forms and procedures in order to secure a claim for salvage of aircraft and its associated property. It follows that a salvor of an aircraft may arrest the aircraft in the possession of the debtor defending the action in personam, whether on the dependence or in execution.

Amendment of Administration of Justice Act 1956, ss. 47 and 48

3.188 As we have seen, the provisions of the Administration of Justice Act 1956, ss. 47 and 48,[1] restrict the competence of arrestment of ships. Section 47(1) contains the main restricting provisions. It speaks of warrants having effect "as authority for the detention of a ship" but surprisingly no mention is made in s. 47(1) of aircraft. Section 47(2) limits the claims which may be secured by arrestment of ships including, in para. (c), salvage. Section 48(e) provides:

> "Any reference to claims arising out of salvage includes a reference to such claims for services rendered in saving life from a ship or aircraft or in preserving cargo, apparel or wreck as, under sections 544 to 546 of the Merchant Shipping Act 1894, or any Order in Council made under [section 87 of the Civil Aviation Act 1982] are authorised to be made in connection with a ship or aircraft". (emphasis added).[2]

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[1] Quoted at Appendix.

[2] It should be noted that the Aircraft (Wreck and Salvage) Order 1938, article 2 applies sections 544 to 546 of the Merchant Shipping Act 1894 (salvage of life and of cargo and wreck) to aircraft.

It was probably the intention of this definition to adapt section 47 so that it applied to an Admiralty arrestment, whether in rem, or on the dependence or in execution, securing a claim for salvage services rendered to an aircraft. The adaptation is however incomplete as a matter of drafting, and we suggest that the reference in s. 47(1) to "detention of a ship" should be expressly glossed as including a reference to an aircraft in appropriate cases namely salvage, and as we note below towage and pilotage. Moreover, for the reasons under-noted,[1] section 48(e) of the 1956 Act should be amended so as to refer to claims under the Civil Aviation Act 1982, s. 87.

Admiralty arrestments on the dependence or in execution securing claims for towage and pilotage of aircraft

3.189 Claims for towage and pilotage services rendered to ships (which are not maritime liens) are Admiralty causes and are also specified in section 47(2) paras. (i) and (j) of the Administration of Justice Act 1956 as claims for which the ship in question may be arrested on the dependence. Section 48(f) of the 1956 Act provides that in section 47:

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

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[1] It may be that the draftsman of s 48(e) thought that claims for salvage services mentioned in the aviation primary legislation (ie formerly the Air Navigation Act 1920, s 11, now Civil Aviation Act 1982, s 87) are technically made under the Order-in-Council of 1938, whereas articles 4 and 6 of the Order distinguish between claims under the aviation primary legislation and claims under the Order, which shows that the two types of claim are not the same. A claim under the Order might be a claim under article 2 (see previous footnote).

This provision assumes that s. 47(2)(i) and (j) apply to aircraft, and the drafting would be improved if s. 47(2)(i) and (j) were expressly extended so as to apply to aircraft.[1]

3.190 More importantly, the legislative intention or assumption was probably that a claim for towage or pilotage of a waterborne aircraft would be an Admiralty cause (as in English law[2]) and treated in the same way as claims for towage or pilotage of ships in Admiralty actions in personam. The Rules of the Court of Session however do not include claims for towage and pilotage of aircraft among Admiralty causes.[3] We suggest that such claims should be so included and that it should be provided by statute that the law on towage and pilotage of ships applies to aircraft.

Admiralty arrestment of aircraft to be ancillary to Admiralty actions only

3.191 Under existing law, (a) the maritime law on salvage would apply to aircraft where the cause of action arises in the maritime environment as defined by the Civil Aviation Act 1982, s. 87(1) and (b) the maritime law on towage and pilotage would apply to aircraft where the cause of action arises within the territorial limits of Admiralty jurisdiction whatever these may be.

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[1] Compare the provisions for England and Wales in the Supreme Court Act 1981, s 20(2)(k) and (l).

[2] Idem.

[3] See RC 135. The assumption in this rule appears to be that all the enumerated claims relate to ships though that is not expressly provided. If heads (viii)(pilotage) and (xi)(towage) relate to aircraft, then so must other heads, such as (x) (claims for necessaries), which appears most unlikely.

3.192 We do not consider that Admiralty arrestments should apply to aircraft generally in cases where the action is not an Admiralty action. Admiralty arrestments are a somewhat distinctive and exceptional form of diligence peculiarly adapted to ships, and should not be extended to other forms of moveables more than is necessary. In Part IV below, we advance proposals for the introduction of a new diligence of interim attachment on the dependence which would apply to aircraft.

3.193 Warrants to dismantle poinded aircraft. There is however one feature of Admiralty arrestments which might be introduced into the law on poindings. In Admiralty arrestment of ships, it is competent to obtain an ancillary warrant to dismantle and to execute that warrant at the same time as executing the warrant of arrestment. In poindings, the nearest equivalent to a warrant to dismantle is an order under s.21(1)(b) of the Debtors (Scotland) Act 1987 for security of poinded goods, but such an order cannot be obtained till after the execution of the poinding. We suggest that before an aircraft is poinded it should be competent to apply for an order for dismantling of the aircraft, the dismantling order being exercisable at or after the execution of the poinding.

Our proposals

3.194 We propose:

(1) **In section 47(1) of the Administration of Justice Act 1956 (restrictions on competence of arrestment of ships), the reference to a ship should be defined as including a reference to an aircraft, in cases relating to salvage, towage and pilotage of aircraft.**

(2) The 1956 Act section 48(e) (definition of claims arising out of salvage) should be amended so as to refer to claims under the Civil Aviation Act 1982, s. 87 (which applies to aircraft the law of wreck and salvage of ships).

(3) Provision should be made by statute, supplementing the 1956 Act, s. 48(f) (definition of "towage" and "pilotage" in relation to aircraft), making it clear that:

(a) the law of towage and pilotage applies to aircraft while waterborne as it applies to vessels; and

(b) claims in respect of the towage and pilotage of waterborne aircraft are enforceable by way of Admiralty action in personam, and by arrestment in the hands of the defender or debtor.

(4) Except in cases of Admiralty actions involving salvage, towage and pilotage of aircraft, Admiralty procedures and arrestments should not apply to aircraft.

(5) It should be competent for a creditor who proposes to poind an aircraft, to apply, before executing the poinding, for an order for dismantling the aircraft exercisable at or after the execution of the poinding, without prejudice to the creditor's right to apply after the execution of the poinding for such an order under the Debtors (Scotland) Act 1987, s. 21(1)(b).

(Proposition 42).

(c) Hovercraft

3.195 The Hovercraft Act 1968, s. 2(1) provides that Part V of the Administration of Justice Act 1956 (which includes ss. 47 and 48 discussed above) should have effect as if references to ships included references to hovercraft. The intention seems to have been to make claims relating to hovercraft specified in s. 47(2) of the 1956 Act into Admiralty causes. It appears to have been overlooked that the 1956 Act, s. 47(2) does not define the Admiralty jurisdiction of the Scottish courts, in contrast to section 1 of that Act as originally enacted which defined the Admiralty jurisdiction of the English High Court. What section 47(1) and (2) does is to assume that Admiralty causes are competent (under RC 135) and to restrict the power of arrestment to the claims specified in s. 47(2). Clearly, the definition of Admiralty causes in RC 135, when revised as mentioned above,[1] should be made applicable to hovercraft.

3.196 The Hovercraft Act 1968, s. 2(1) also enacts that section 4 of the Sheriff Courts (Scotland) Act 1907 (which provides inter alia that powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes shall be competent to the sheriff) should apply to hovercraft.

3.197 Section 2(2) of the 1968 Act applies the law on maritime liens to hovercraft. Further the Hovercraft (Application of Enactments) Order 1972[2] article 8(1)(a) applies inter alia the provisions on wreck and salvage of the Merchant Shipping Act 1894, s. 544-546 to hovercraft, and overlapping provision is made by article 8(3) applying the law on salvage to hovercraft.

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[1] See para 3.15 (Proposition 27).

[2] SI 1972/971.

3.198 So far as we are aware, no hovercraft operate in Scotland as yet, and we are not aware of any difficulties arising from the foregoing provisions, except the technical amendment required to apply RC135 to hovercraft.

3.199

The definition of Admiralty causes competent in the Scottish courts in RC 135, or in any enactment replacing it, should be adapted so as to apply to hovercraft.

(Proposition 43).

PART IV

PROVISIONAL MEASURES ON THE DEPENDENCE AGAINST CORPOREAL MOVEABLES IN THE DEFENDER'S POSSESSION

Preliminary

4.1 It will be evident from Parts II and III above that there is a gap in the provisional and protective measures available under Scots law insofar as there is no means of attaching moveable property in the defender's possession on the dependence of an action for payment. In this Part, we seek views on whether or how this gap should be filled.

Development of the law

4.2 By a quirk of legal history, the policy of the law was formulated first in the context of inhibitions. At one time, an inhibition operated against the moveable as well as the heritable property of the defender[1] but, as Bell remarked[2], "with the growth of commerce it has been gradually restricted to the heritable estate, leaving the moveable to be affected by arrestment".[3] As we have seen, arrestment only affects moveables in the possession of a person other than the defender or debtor, or persons who in law are identified with him (ie. his employees or general factors or commissioners), otherwise, as Bell observed[4], an arrestment "would operate as an inhibition in moveables, without being attended by those requisites of publication which accompany that diligence".

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1 Dalrymple v Lyell (1687) Mor 1052; but compare the cases at fn 3 below.

2 Bell, Commentaries vol 2, pp 68; 70 (see para 3.82 above).

3 See also Graham Stewart, p 546; Lord Braco v Ogilvy (1623) Mor 7016 where the Court held that "moveables are of that nature, that, falling under daily commerce, the dealing and trafficking therein ought not to cease by simple inhibition, without arrestment proceeding upon lawful cause"; Aitken v Anderson (1620) Mor 7016; Scot v Coutts (1750) Mor 6988.

4 Commentaries, vol 2, p 70.

4.3 Thus the underlying policy of this development of the law, conceived in the interests of commerce, was against a restraint on the attachment of goods in the defender's possession by those diligences, arrestment and inhibition, which were available on the dependence of actions for payment. This policy was altogether intelligible against the background of a system in which warrants for arrestment and inhibition on the dependence were granted automatically. The effect on commerce of an automatic attachment of moveable stock-in-trade on the dependence is self-evident. It does not follow that such a restraint should be rejected if the grant of warrant to attach moveables in the defender's possession on the dependence were to be a discretionary decision made by a judge after due enquiry.

Previous official consideration

4.4 On a previous occasion, we have already considered, and rejected, a proposal to introduce poinding on the dependence in the context of a system in which warrants for diligence on the dependence were and are available to a pursuer as of right. As the McKechnie Committee[1] had recognised, it seems at first sight difficult to justify a rule whereby poinding on the dependence is incompetent. In our Consultative Memorandum No. 48[2], however, we pointed out that in practice arrestment is generally a quicker, cleaner and cheaper diligence and is less often attended by unpleasant consequences than poinding,[3] and we suggested that diligence on the dependence and indeed poindings should not be more widely available than is necessary. This provisional conclusion was generally accepted on consultation and in our

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[1] Paras 48-49.

[2] Consultative Memorandum No 48 on Poindings and Warrant Sales para 2.3.

[3] See eg Hill Burton Report on Arrestment of Wages (1854) Parliamentary Papers, LXIX, p 41. It has been traditional in Scotland to use an arrestment rather than a poinding as a diligence of first resort where practicable.

Report on Diligence and Debtor Protection[1] we recommended that the diligence of poinding should not be available in security of debts payable in the future nor should it be automatically available on the dependence of a court action.

4.5 One body suggested to us that a pursuer should be entitled to obtain a warrant for poinding on the dependence, not automatically as of right, but on showing cause to the court why such a warrant should be granted. We did not consider that proposal because a similar recommendation had already been made by the Maxwell Report on Jurisdiction and Enforcement.[2] That Report recommended[3] that the Court of Session should have a discretionary power to make an order securing inter alia moveable property in the hands of a defender on the dependence of an action in the Court of Session. The order would be enforced in Scotland by the ordinary procedure of poinding and would thus be a type of poinding on the dependence which, on final judgment, would be converted into a poinding in execution followed ultimately by warrant of sale.

4.6 This recommendation was a response to European cases which were construed as suggesting that the Scottish courts would be required by Community law[4] to give effect to comparable orders of Courts in EEC Contracting States made on the

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[1] Paras 5.236 - 5.238, recommendation 5.50 (para 5.238).

[2] Report of the Scottish Committee on Jurisdiction and Enforcement (1980) HMSO Edinburgh (Chairman: the Hon Lord Maxwell).

[3] Ibid, paras 14.8 to 14. 25.

[4] European Judgments Convention, article 24.

dependence of actions in these courts.[1] In fact, it seems to be accepted that provisional and protective measures are a matter for the internal law of the country in which such measures are sought (rather than for the law of the country where the action is depending).[2] The recommendation was not accepted by Government or implemented by statute, and the Civil Jurisdiction and Judgments Act 1982, s. 27 empowers the Court of Session to grant warrants for arrestment and inhibition on the dependence and interim interdict but not poinding on the dependence.

The need for reform

4.7 We have, however, thought it right to re-open this question against the background of the proposed new system of granting warrants for diligence on the dependence outlined in Parts II and III above, which includes the judicial discretionary grant of warrants after enquiry. It seems to us arguable that the present law is defective from the standpoint of litigants pursuing actions for payment in the Scottish courts. The inability of such a litigant to attach goods in the defender's possession seems to us to be an anomalous and unnecessary gap which ought to be filled if proper safeguards for defenders can be devised.

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[1] Maxwell Report, paras 14.8 to 14. 10; De Cavel v De Cavel (No 1) (European Court Case 143/78) [1979] ECR 1055; 1979 2 CMLR 547;1984 SLT (European Court Case Notes) 18; Denilauler v Couchet Freres (European Court Case 125/79); [1980] ECR 1553; [1981] 1 CMLR 62; 1984 SLT (European Court Case Notes) 24.

[2] Anton, Civil Jurisdiction in Scotland p 126.

4.8 We are reinforced in this provisional view by the fact that the legal systems of other countries, including England and Wales, Germany, France, Italy and Sweden,[1] make provision for authorising provisional and protective measures covering moveables in the possession of defenders on the dependence of actions for payment.

Options for reform

4.9 It seems to us that there are four main options for reform, namely:

(a) the introduction of poinding on the dependence;

(b) the introduction of a system of arrestment on the dependence of moveable goods in the defender's possession;

(c) the introduction of a system of interdicts against the disposal of, or dealing with, moveable goods pendente lite; and

(d) an interim attachment order preventing disposal of moveable goods pendente lite or until the goods can be poinded in execution.

First option: poinding on the dependence

4.10 We remain of the view that the provisional measures should not take the form of poinding on the dependence even if the warrant to poind were to be granted by a judge exercising a

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[1] See paras 2.47 to 2.54 above.

discretion after enquiry. The procedure in a poinding involves the inventorying and valuation by an officer of court (messenger-at-arms or sheriff officer), accompanied by a witness, of moveable goods at the defender's premises,[1] and is thus a more elaborate and expensive diligence than is necessary or appropriate in the case of a diligence on the dependence of an action. There is also the fact that poinding is preceded by a charge to pay which is inappropriate in the case of a diligence on the dependence, and this is a desirable safeguard which arguably ought not to be dispensed with. Moreover, a poinding has the effect that unless specially authorised, the debtor is not entitled to move the poinded goods from the place where they were poinded[2], a restriction which goes beyond what is necessary or desirable in the case of a diligence on the dependence. We think it likely that the introduction of poinding on the dependence would arouse considerable opposition and we therefore reject that option.

Second option: arrestment on the dependence of moveable goods in the defender's possession

4.11 Under the second option, the pursuer would apply to the court for a warrant to arrest specified moveable goods in the defender's possession. If decree of payment were granted, the extract of the decree would convert the arrestment into an arrestment in execution which could be completed by an action of furthcoming concluding for warrant of sale. This option would have the advantage that the goods could be attached on the dependence without the need for inventorying and valuation while the action is in dependence.

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[1] See Debtors (Scotland) Act 1987, s 20.

[2] Ibid s 28.

4.12 This approach would, however, create difficulties at the later stage when, after extract of the decree for payment, the goods attached require to be sold. First, it would seem almost impossible to justify new procedures for the judicial sale of goods in the defender's possession which differ substantially from the new procedures for poinding and warrant sale recently enacted in Part II of the Debtors (Scotland) Act 1987. Many of these procedures can only operate effectively where there has been a poinding (involving the valuation and inventorying of the goods by an officer of court), e.g. the debtor's right to redeem the goods at valuation or the sheriff's power to refuse warrant of sale if the value of the goods do not justify the expense of a sale at an auction room. The procedures would not operate effectively where there has merely been an arrestment (which does not involve valuation). Second, an arrestment is simply the first part of the diligence of arrestment and action of furthcoming (except in the special case of Admiralty arrestments). An action of furthcoming is mainly designed to enable a third party arrestee to put forward defences against making the goods furthcoming, and is not appropriate where (as here) there is no third party arrestee. Third, it seems to follow that, if the provisional measure is to be a diligence (and not an interdict), what is needed is an interim attachment on the dependence followed after extract by a poinding and warrant sale. An arrestment in our law is a prelude to a furthcoming or an Admiralty process of sale, and it would be confusing and anomalous to make an arrestment a prelude to a poinding. With the special exception of Admiralty arrestments, we suggest that arrestments should be confined to debts and moveable property in the possession of a third party.

Third option: interdicts against disposing of or dealing with moveable goods in the defender's possession

4.13 Under the third option, the pursuer would apply to the court for an interdict prohibiting the defender from disposing of, burdening, removing, concealing or otherwise dealing with his moveable goods in his possession in such a way as to frustrate or prejudice the eventual enforcement of the pursuer's claim. This form of interdict would thus to some extent resemble a Mareva injunction[1] or an order under section 18 of the Family Law (Scotland) Act 1985 interdicting a spouse from effecting a transfer of property or a transaction involving property. Interdicts of the latter type are not confined to moveables in the possession of the interdicted spouse and are only competent in connection with actions for aliment, divorce or declarator of nullity of marriage and related applications.

4.14 An interdict of the type predicated would however differ from a diligence on the dependence insofar as an interdict does not have the effect of imposing a nexus on property of the party interdicted, nor of giving the party obtaining the interdict a preference in insolvency proceedings or other processes of ranking on the interdicted party's estate. To avoid the proliferation of anomalies, we suggest that so far as possible provisional and protective measures on the dependence should take the form of diligences.

4.15 It might be thought that since, in the context of aliment and divorce actions, it is generally accepted that arrestments and inhibitions on the dependence are preferable to interdicts,[2] the

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[1] See paras 2.48 to 2.50 above.

[2] See Wilson v Wilson 1981 SLT 101 at pp102-3 approved in Pow v Pow 1987 SLT 127 at p129; 1987 SCLR 290, referred to at para 2.107 above.

same reasoning would apply to a legislative choice between interdicts against disposal of moveable goods in the defender's possession and an interim attachment such as we discuss below. That reasoning is based on the view that interdicts are generally only enforceable by the sanctions for contempt of court, whereas diligence on the dependence can normally operate effectively without recourse to such sanctions. But the analogy may be false because if goods were to be attached ad interim in the defender's possession, as distinct from arrested in the possession of a third party, often the only real sanction against breach of the interim attachment may be the sanctions applicable to contempt of court. A third party-arrestee parting with arrested goods in breach of arrestment may be required to pay their value to the arrester, but where the arrestee is a defender pursued for debt, such a remedy for breach of an interim attachment may not be realistic. Although we reject interdict, we do so for other reasons than the need to minimise recourse to the sanctions for contempt of court.

4.16 An interim attachment on the dependence followed by a poinding would entail the somewhat unusual consequence that a nexus would be imposed on the goods affected on two occasions, first by an interim attachment and thereafter by a poinding. Since an interdict operates only against the person of the defender and does not impose any nexus on the property in question, an interdict would avoid that unusual result. The incidents and consequences of an interim attachment as described below, however, would not be precisely the same as the incidents and consequences of a poinding and accordingly, although the successive attachment would be unusual, we think that it can be justified in principle and would not be decisive in favour of interdict. We therefore provisionally reject interdict as the preferred option.

Preferred option: interim attachment followed by poinding in execution

4.17 We have therefore reached the provisional view that it should be competent for the court to make an order granting warrant for attaching specified moveable goods in the defender's possession on the dependence of an action for payment which would have effect for a period after extract of the decree for payment to allow the pursuer to poind the goods.

4.18 Form of warrant. We suggest that a warrant for interim attachment of corporeal moveables in the defender's possession should specify the particular moveables affected by the attachment with sufficient precision to leave the defender in no doubt as to what moveables are attached. An additional test of specification might be that it should enable an officer of court (messenger-at-arms or sheriff officer) to identify what moveables are affected by the attachment.

4.19 Grant of warrant. The warrant should only be granted by a judge (Lord Ordinary or sheriff) on an application in accordance with the principles and procedure set out in Part II applicable to the discretionary grant of warrants for diligence on the dependence.[1] Whatever solution is ultimately adopted for the grant of warrants for diligence on the dependence, the pursuer should not have the alternative option of obtaining a warrant for interim attachment automatically with the risk of incurring strict liability. Such an automatic entitlement would be inconsistent with the court's power to specify the corporeal moveables which would be affected by the interim attachment.

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[1] See Propositions 2(2) at para 2.69; 3 at para 2.79; 4 at para 2.90; 5 at para 2.92; 6 at para 2.101; and 7 at para 2.105.

4.20 Mode of execution. The interim attachment would be executed by the service of a schedule of interim attachment (in a form prescribed by act of sederunt) on the defender. It is suggested that the competent modes of service should be the same as for the service of a schedule of arrestment on a third party arrestee.

4.21 Effect of interim attachment. We propose that the interim attachment should have the same effect as an arrestment or poinding in rendering the affected property "litigious" in the sense that the defender would not be entitled to dispose of it, but a bona fide purchaser for value, or a lender on security of a pledge, transacting without notice of the duly executed interim attachment would have a good title, if the purchaser or lender is in possession.[1]

4.22 Under the present law, an arrestment in the hands of a third party prohibits the third party from parting with the arrested subjects[2] but does not fix the subjects in a particular place, unlike a poinding in execution[3] or the arrestment of a ship.[4] Further, there is authority that an arrestment in the hands of a third party does impliedly prohibit the arrestee from moving the property from the jurisdiction.[5] On that analogy, we propose that, subject to any orders made by the court on or after granting the warrant for interim attachment, the defender should be entitled to move the attached moveables from the place where they were situated at the time of the execution of the interim attachment so long as he does not remove them from the jurisdiction or part with possession of them.

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1 Graham Stewart, p125; pp126-128 (arrestment); p362 (poinding).

2 See para 2.2 above.

3 Debtors (Scotland) Act 1987, s.28.

4 See para 3.5, head (b), above.

5 See para 3.94 above.

4.23 Exceptions and exemptions by law from interim attachment. Since an interim attachment would be a prelude to poinding, only poindable subjects should be liable to interim attachment. This would exclude cash and negotiable instruments in the defender's possession.[1] Moreover, in principle, goods in the defender's possession which are exempt from poinding should also be exempt from the proposed new form of interim attachment. These exemptions are of two kinds. The first relates to specified articles, wherever situated, which are reasonably required for the use of the debtor or any member of his household, namely (a) clothing; (b) implements, tools of trade, books or other equipment required in a profession, trade or business, not exceeding £500 in aggregate value; (c) medical aids and equipment; (d) books and other articles required for education or training not exceeding £500 in aggregate value; (e) children's toys and (f) articles reasonably required for care or upbringing of a child.[2]

4.24 We propose that these articles should be exempt from interim attachment irrespective of the value of the articles. In the absence of a valuation by an officer of court, a limit by reference to value would not be practicable. It is thought that the exemptions apply only in relation to debtors who are individuals so that trade equipment owned by a company would not be exempt from interim attachment. This wider exemption can be justified on the ground that the attachment only operates on the dependence.

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[1] We propose to consider in a future discussion paper whether cash and negotiable instruments in the defender's possession should be attachable.

[2] Debtors (Scotland) Act 1987, s.16(1).

4.25 The second type of exemption relates to a list of 16 categories of what may broadly be called essential household goods belonging to a debtor which are situated in a dwelling-house (which may be the debtor's or a third party's) and reasonably required for the use of the person residing there or a member of his household.[1]

4.26 We suggest that the exemption should be wider and that no corporeal moveables of the defender in his possession and situated in a dwelling-house (whether of the defender or a third party) or its curtilage at the time of the execution of the interim attachment, or such other time as the court may specify, should be subject to interim attachment, except possibly a vehicle on those premises. We concede that the result would be somewhat arbitrary but we think that there should be a clear rule to avoid disputes as to what is exempt or not exempt. We propose that no officer of court should be empowered to enter a dwelling to inspect and inventory goods while the action for payment is in dependence, so that there would be no practical means of applying the existing statutory exemption for household goods. Moreover, an exemption from an interim attachment on the dependence can in principle be more generous to defenders than an exemption from poinding in execution.

4.27 We consider that normally goods in a dwelling at the time of the service of the schedule of interim attachment would be exempt, but where the warrant for interim attachment was granted after an opposed hearing, the court might wish to fix an earlier time, such as the time of the making of the application, to prevent the defender from frustrating the order by moving goods into a dwelling-house. Difficulties might arise from the fact

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[1] Debtors (Scotland) Act 1987, s16(2).

that there is no official record of what goods were or were not in a dwelling at the relevant time, but the goods to be attached would be specified in the warrant for interim attachment and the onus should be on the defender to prove that the goods were in a dwelling at the relevant time.

4.28 Mobile homes, such as caravans, houseboats and similar moveable structures which are the only or principal residence of the defender are not exempt from poinding, though the court may sist the proceedings in a poinding for a specified period.[1] An interim attachment would not prevent a mobile home from being moved from place to place within the jurisdiction, in the absence of a court order, and at present we consider that mobile homes should not be exempt from interim attachment. We invite views.

4.29 Because of the long, or potentially long, gap in time between an interim attachment and a warrant sale in pursuance of a poinding, articles which are of a perishable nature or likely to deteriorate substantially and rapidly in condition or value should probably be exempt. Such articles may be sold by a quick procedure in a poinding[2] but such a sale is not appropriate while an action is in dependence.

4.30 Articles in the common (pro indiviso) ownership of the debtor and a third party may be poinded and sold under special provisions.[3] We seek views on whether such articles should be exempt from interim attachment.

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[1] Debtors (Scotland) Act 1987, s.26.

[2] Debtors (Scotland) Act 1987, s21(1)(b).

[3] Ibid, s41.

4.31 Ancillary orders. We propose that it should be competent for the court to grant ancillary orders as to the security or location of the moveables affected by an interim attachment, including in appropriate cases warrants to dismantle in aid of orders preventing removal of property from the jurisdiction, e.g. aircraft, vehicles or vessels on non-tidal waters not subject to Admiralty arrestments. An ancillary order might also, for example, give the defender permission to remove attached property from the jurisdiction on an undertaking to return it by a specified time or on a specified event.

4.32 Restriction, recall and loosing. We suggest that the rules and procedures relating to the restriction and recall of arrestments and inhibitions on the dependence[1] should apply with any necessary modifications to cases where the diligence takes the form of an interim attachment. Loosing in the strict sense of that term would not be competent since loosing presupposes that the goods are in the possession of a third party arrestee and takes effect where the defender uplifts the property from the arrestee's possession.[2] If decree for payment had been granted and extracted, the rules on recall of arrestments in execution would apply, namely, that recall is normally granted only where the diligence is irregular or incompetent or in very special circumstances on caution or consignation.[3]

4.33 Declaratory finding as to goods attached. There may be cases in which the pursuer and defender are in dispute as to whether particular goods are attached by an interim attachment. We think that it would be useful if the court had power to

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[1] See para 2.202ff.

[2] See para 2.246 above.

[3] Graham Stewart, p195; Lord Ruthven v Drummond 1908 SC 1154.

resolve the dispute by a declaratory finding pronounced on an incidental application in the process.

4.34 Termination of interim attachment. An interim attachment on the dependence such as we propose would be an inchoate diligence, which would be replaced by another inchoate diligence, that of poinding in execution after decree of payment was granted. It would not itself be completed by a judicial sale; the eventual judicial sale would be a warrant sale in pursuance of a poinding.

4.35 Provision would have to be made for terminating the interim attachment. We suggest that it should cease to have effect (generally or in relation to particular articles) (a) on judicial recall; (b) on the pursuer extra-judicially releasing goods from the attachment; (c) when the action of payment is finally disposed of in the defender's favour and decree of absolvitor or dismissal is granted; (d) on the lapse of a prescribed period of (say) six months after the extract of decree of payment; and (e) on the execution of a poinding of all the articles subject to the interim attachment. The period of six months is selected as giving the pursuer a reasonable time in which to execute a charge to pay and a poinding.[1]

4.36 Expenses. We suggest that the same rules should apply to the expenses of execution, recall and restriction of interim attachment as apply in relation to arrestment on the dependence.[2]

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[1] The days of charge are 14 days if the defender is in the United Kingdom and 28 days if he is outside the United Kingdom or his whereabouts are unknown: Debtors (Scotland) Act 1987, s90(3).

[2] See paras 2.123ff and 2.230ff.

4.37 Sanctions for breach of interim attachment. We propose that the primary sanction for breach of interim attachment should be the sanction of contempt of court, on analogy with the sanctions for breach of arrestment of ships.[1]

4.38 Effect of insolvency proceedings on interim attachment. Under section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, section 185, arrestments and poindings executed within a prescribed period of 60 days before the date of sequestration or the commencement of the winding up of a company are rendered ineffectual in a question with the trustee or liquidator. We suggest that these provisions should apply to an interim attachment. The effect would be that if the interim attachment were executed prior to the 60 days period, but a poinding of the goods subject to the interim attachment were executed within that period, the poinding would not be rendered ineffectual by the statutory provisions. The creditor's preference would depend not on the poinding but on the prior interim attachment. We defer consideration of how interim attachment would be integrated into the rules for the equalisation of diligences outside insolvency proceedings[2] until we have considered the response to our Discussion Paper No. 79 on Equalisation of Diligences.

4.39 Having regard to the decision in the Lord Advocate v Royal Bank of Scotland,[3] an interim attachment would not be an

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[1] See para 3.76 above: Inglis & Bow v Smith & Aikman (1867) 5 M 320; Meron v Umland (1896) 3 SLT 286.

[2] Bankruptcy (Scotland) Act 1985, Sch. 7, para 24 (equalisation of arrestments and poindings within 60 days before, and 4 months after, the constitution of apparent insolvency).

[3] 1977 SC 155.

"effectually executed diligence on the property of the company" for the purpose of competitions with floating charges.[1]

4.40 Time to pay directions in decrees and time to pay orders. Under Part I of the Debtors (Scotland) Act 1987, the court has power to sist, recall or restrict arrestments, including arrestments on the dependence, in connection with a time to pay direction in a decree for payment or with a time to pay order.[2] We propose that the court should have similar powers in relation to interim attachments of moveables in the defender's possession. The period during which an interim order sisting diligence, or a time to pay direction or order, is in force should be disregarded in reckoning the 6 months period after extract during which the interim attachment has effect.[3]

4.41 Our proposals. We propose:

(1) **It should be competent for the court to make an order granting warrant for the attachment of specified moveable goods in the defender's possession on the dependence of an action for payment, which would normally have effect for a prescribed period, after the extract of the decree for payment, to allow time for the pursuer to poind the goods. This new form of diligence may, for short, be called an interim attachment.**

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[1] Companies Act 1985, s463(1)(a); Insolvency Act 1986, ss55(3), 60(1)(b).

[2] See Debtors (Scotland) Act 1987, ss2(3), 3(1), 6(3), 9(2)(e) and 10(1)(b).

[3] Cf. Debtors (Scotland) Act 1987, ss8(3) and 9(9).

(2) The warrant for interim attachment, and the schedule of interim attachment implementing the warrant, should specify the particular moveable goods affected by the attachment with sufficient precision to leave the defender in no reasonable doubt as to what moveables are attached.

(3) A warrant for interim attachment should only be granted by a judge (Lord Ordinary or sheriff) in accordance with the principles and procedures set out in Part II for the discretionary grant of warrants for diligence on the dependence, with any necessary modifications. (See Propositions 2(2) at para 2.69; 3 at para 2.79; 4 at para 2.90; 5 at para 2.92; 6 at para 2.101; and 7 at para 2.105).

(4) (a) The interim attachment should be effected by the service of a schedule of interim attachment in a form prescribed by act of sederunt.

(b) The modes of service should be the same as in the service of a schedule of arrestment.

(5) The interim attachment should have the same effect as an arrestment or poinding in rendering the affected corporeal moveables litigious, and in giving the pursuer a preference, by virtue of the nexus imposed on the moveables, in any insolvency proceedings or other process of ranking on the defender's estate.

(6) Only poindable subjects should be liable to interim attachment. The following categories of corporeal moveables should be exempt from interim attachment, namely:

(a) articles specified in the Debtors (Scotland) Act 1987 section 16(1) (which exempts certain articles wherever situated from poinding) irrespective of the value of the articles, and accordingly the monetary limits on the exemptions in paragraphs (b) and (d) of section 16(1) should not apply to exemptions from interim attachment;

(b) all articles belonging to the defender located in a dwelling-house (whether the defender's or a third party's) or its curtilage at the time of execution of the interim arrestment or at such other time as may be specified by the court in the warrant (except possibly a vehicle); and

(c) articles of a perishable nature or likely to deteriorate substantially and rapidly in condition or value.

(7) Views are sought on whether the following articles should be exempt from interim attachment, namely:

(a) a mobile home, such as a caravan or houseboat, which is the only or principal residence of the defender;

(b) corporeal moveables owned in common (pro indiviso) by the defender and a third party; and

(c) a vehicle of the defender within the curtilage of a dwelling-house.

(8) It should be competent for the court to make interim orders (on incidental motions or, after extract, incidental applications in the interim attachment process) as to the security or location of corporeal moveables subject to interim attachment, including orders allowing temporary removal from the jurisdiction and orders granting warrant to dismantle.

(9) While the action is in dependence, the rules and procedures relating to the restriction and recall of arrestments and inhibitions on the dependence should apply with any necessary modifications to the recall and restriction of interim attachments. Where the interim attachment continues in effect after decree for payment, recall should be granted only on the more limited grounds on which an arrestment in execution may be recalled.

(10) It should be competent for the court, on an incidental motion or, after extract, an incidental application in the interim attachment process, to pronounce an order finding whether particular goods are affected by the interim attachment.

(11) An interim attachment should cease to have effect (generally or in relation to particular articles):

(a) on judicial recall of the interim attachment;

(b) on the pursuer extra-judicially releasing goods from the interim attachment;

(c) when the action of payment is finally disposed of in the defender's favour and decree of absolvitor or dismissal has been granted;

(d) on the lapse of (say) 6 months after the extract of the decree for payment; or

(e) on the execution of a poinding of the articles subject to the interim attachment.

(12) The rules as to the expenses of execution, recall and restriction of arrestments on the dependence should apply in relation to interim attachment.

(13) Breach of an interim attachment should be punishable as a contempt of court.

(14) Section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, section 185 (which relate to the effect of sequestration and liquidation in rendering ineffectual arrestments and poindings executed within 60 days prior to the date of sequestration or the commencement of the winding up of a company) should apply to interim attachments. Where an interim attachment of goods prior to the 60 days period is followed up by a poinding of those goods within that period, the creditor should nevertheless remain entitled to the preference derived from the interim attachment.

(15) The power of the court to sist, recall or restrict arrestments under the Debtors (Scotland) Act 1987, Part I, should apply in relation to interim attachments as mentioned in paragraph 4.40 above.

(Proposition 44)

PART V

SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

Note Attention is drawn to the notice at the front of this Discussion Paper concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this Discussion Paper may be referred to or attributed in our subsequent report.

Diligence on the Dependence (Part II)

Proceedings in which diligence on dependence competent

1.

(1) Warrants for diligence on the dependence should continue to be available in actions for payment of a principal sum of money, including actions concluding for a random sum (such as damages or count, reckoning and payment) and should not be available in actions in which the only pecuniary conclusion or crave is for expenses.

(2) Warrants for inhibition on the dependence should continue to be available in actions for specific implement of obligations ad factum praestandum relating to heritable property, so far as competent under the present law. The warrant for inhibition should, however, be limited expressly by a proper conveyancing description to the particular heritable property to which the obligation relates.

(3) Is there any need for warrants for diligence on the dependence to be available in Court of Session petitions containing a prayer for a decree for payment of a sum of money other than expenses?

(Para. 2.12).

Legal right or judicial discretion: main options for reform

2. Views are invited on the following options for reform.

(1) A pursuer should continue to be entitled to obtain a warrant for diligence on the dependence, granted by a clerk of court automatically in the ordinary course of process, but the pursuer should be liable to the defender in damages for wrongful diligence if his action should turn out to be wholly unsuccessful. For this purpose, an unsuccessful action means an action in which decree of absolvitor or dismissal is granted, except where the decree is consequential on a settlement of the action. We do not, however, favour this option.

(2) The court should have a discretionary power, exercisable by a judge on the pursuer's application initially ex parte, to grant or refuse to grant the warrant, subject to restrictions or conditions. The pursuer's liability in damages for wrongful diligence on the dependence executed in a formally regular manner, would be confined to cases where the pursuer had misled the court.

(3) Both of the foregoing options would be introduced by legislation, and the pursuer would be entitled to elect between them.

We prefer the second option but, if that is not acceptable, the third option might suffice.
(Para. 2.69).

Discretionary grant of warrant: procedure

3.

(1) This Proposition and Propositions 4 to 7 below are advanced on the assumption that, as suggested in Proposition 2, the courts should have a discretionary power to grant, or to refuse to grant, warrant for diligence on the dependence.

(2) (a) An application for discretionary grant of a warrant for diligence on the dependence should be competent before service of the summons or initial writ, and should initially be made ex parte (unless the pursuer chooses to intimate the application), whether the application is for a warrant to be inserted in the summons or initial writ, or to be granted at a later stage in the depending action.

(b) The grounds of the application should be set out in writing as mentioned at para. 2.71 above.

(3) In disposing of or dealing with the application, the court should have power:

(a) to grant a warrant for inhibition on the dependence or arrestment on the dependence or both; or

(b) to grant the warrant subject to restriction of its terms; or

(c) to refuse to grant the warrant simpliciter; or

(d) to refuse to grant the warrant ex parte, to order intimation of the application to the defender, and such other interested person (if any) as the court thinks fit, and to appoint a time for a hearing of the application at which objections may be made.

(4) The court's power to restrict the warrant mentioned at para. (2)(b) above should include power:

(a) to limit a warrant for inhibition on the dependence to subjects specified in the warrant (by a sufficient conveyancing description) or to except subjects so specified from the scope of the warrant; and

(b) to limit a warrant for arrestment on the dependence to particular funds or property, or to except particular funds or property from the scope of the warrant, and

also power to restrict the amount which an arrestment will secure, or in respect of which an inhibition will have effect, to an amount less than the amount of the sums claimed in the depending action.

(5) The application for the warrant should normally be disposed of on the basis of the averments of the pursuer and (if defences have been lodged) the defender, and on a

prima facie presentation of the facts, but the court should have the same restricted power to allow proof in exceptional circumstances as it possesses in applications for recall or restriction under the existing law.

(Para. 2.79).

Discretionary grant of warrant: grounds

4.

In an application to the court for the discretionary grant of warrant for diligence on the dependence, the warrant should only be granted where it appears to the court:

(a) that there is a real and substantial risk that, in the event of the pursuer obtaining decree, the enforcement of the decree may be frustrated or materially prejudiced by:

(i) insolvency proceedings or the diligence of other creditors against the defender's property; or

(ii) the defender removing assets from the jurisdiction, or disposing of, burdening, removing, concealing or otherwise dealing with his assets; and

(b) that it would be reasonable to grant the warrant, with or without restrictions or conditions, having regard to the need to avoid the excessive and oppressive use of diligence on the dependence and to all the other relevant circumstances of the case.

(Para. 2.90).

Caution or consignation by defender

5.

Where in an opposed application for the discretionary grant of warrant for diligence on the dependence at which the defender appears, the court decides to refuse to grant warrant, or to grant a restricted warrant, the court should have power to impose a condition making the refusal or restriction dependent on the defender finding caution for, or consigning, the sum claimed, together with a sum representing an estimate of expenses, or such lesser amount as the court thinks fit.

(Para. 2.92).

Liability for wrongful diligence on dependence, and caution by pursuer

6.

(1) A pursuer using diligence on the dependence in pursuance of a discretionary warrant should be liable in damages for wrongful diligence where the court has been misled into granting the warrant by either:

(a) a material factual statement by the pursuer which he knew, or ought to have known, was untrue; or

(b) the pursuer's failure to disclose to the court material facts within his knowledge.

(2) A pursuer using diligence on the dependence under a discretionary warrant should not however be liable in damages for wrongful diligence merely on the ground that his claim of debt is held by the court to be unfounded or that his action eventually turns out to be unsuccessful.

(3) Views are invited on whether the court should be empowered to require the pursuer to find caution for loss arising from wrongful diligence, as a condition of obtaining a discretionary warrant for diligence on the dependence.

(Para. 2.101).

Appeals

7.

(1) An appeal or reclaiming motion should be competent against the court's decision to grant, or to refuse to grant, the warrant or against any condition attached to the warrant.

(2) It should be competent and possible to make and dispose of an appeal or reclaiming motion quickly.

(3) A warrant should not be prevented from taking effect by reason only of an appeal or reclaiming motion against the grant of the warrant, or against any condition affecting the warrant.

(4) In the Court of Session a reclaiming motion should be competent without leave from the decision of the Lord Ordinary or Vacation Judge to the Inner House. In the sheriff court, an appeal should lie to the Inner House, or to the sheriff principal and thence to the Inner House, without leave. An appeal from the Inner House to the House of Lords should be competent with the leave of the Inner House or, if there is a difference of opinion among the Inner House judges, without leave.

(Para. 2.105).

Warrants for diligence on dependence securing future or contingent debts

8.

(1) The proposals on warrants for diligence on the dependence securing debts already due, liability for wrongful diligence, and related matters, set out in Propositions 3 to 6[1] above, should extend to diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce or nullity of marriage, and should replace the Family Law (Scotland) Act 1985, s. 19.

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[1] See respectively paras. 2.73, 2.84, 2.86 and 2.95.

(2) Should it be provided that the grant of an interdict under the Family Law (Scotland) Act 1985, s. 18 (which interdict prohibits transfers or transactions likely to defeat claims for aliment or financial provision) should only be competent if it appears to the court that inhibition or arrestment on the dependence would not be an adequate remedy?

(Para. 2.118).

Caveats and interdict against diligence on dependence

9.

(1) It should remain incompetent to register a caveat against diligence on the dependence.

(2) No change should be made in the existing law on interdict against diligence on the dependence.

(Para. 2.122).

Liability for expenses of arrestment on dependence

10.

(1) The court should have a discretionary power to award the pursuer the expenses of arrestment on the dependence where the pursuer:

(a) has obtained decree for payment (or for expenses), or the action has been settled; and

(b) shows good reason why the arrestment was used.

Where, however, the arrestment on the dependence was used in pursuance of a warrant granted by the court in its discretion, the pursuer should be presumed to have good reason for using the arrestment unless the defender rebuts that presumption. In any other case, the expenses of arrestment on the dependence should not be chargeable against the defender.

(2) Views are invited on what criteria should determine liability for the pursuer's expenses in applying for a discretionary warrant for arrestment on the dependence.

(3) If the pursuer is unsuccessful in his action,he should be liable to the defender for the defender's expenses in opposing the application.

(Para. 2.130).

Liability for expenses of inhibition on dependence

11.

(1) In a forthcoming Discussion Paper on Inhibitions we intend to invite views on the incidence of liability for the expenses of using inhibitions in execution. It is suggested that if the expenses of using inhibitions in execution are to be recoverable, then the expenses of inhibition on the dependence should be governed by the rules for the expenses of arrestment on the dependence in Proposition 10(1) above.

(2) Whatever rules are ultimately adopted as regards the matters dealt with in Proposition 10(2) and (3) above should apply in relation to expenses in an application for warrant for inhibition on the dependence.

(Para. 2.132).

Arrestment on dependence used prior to service

12.

(1) Where an arrestment on the dependence is executed prior to the service of the summons or initial writ, the existing rules should be retained under which the arrestment falls unless the summons or initial writ is served within a prescribed period after the date of execution of the arrestment.

(2) However the requirement that the action must call or be tabled within a prescribed period should be abolished.

(3) The requirement that a sheriff court arrestment on the dependence used prior to the service of the initial writ or summons must be reported to the sheriff clerk, should be abolished.

(Para. 2.139).

Statutory limits on amount attached by arrestment of money

13.

(1) An arrestment on the dependence of a pecuniary debt due by an arrestee to the defender should attach an amount equivalent to (a) the aggregate of the amounts referred to in the list set out below, or (b) the amount of the debt, whichever is the lesser. The list referred to is as follows:

(i) the principal sum concluded for or craved;

(ii) a flat rate percentage prescribed by statute (say 20%) of the principal sum to cover judicial expenses;

(iii) the expenses of executing the arrestment, if specified in the schedule of arrestment, (together possibly with the expenses of applying for any discretionary warrant authorising the arrestment if so specified); and

(iv) the cumulo interest on the principal sum accrued up to a date specified in the arrestment schedule (being a date occurring not later than the date of arrestment) together with a sum so specified equivalent to one year's future interest at that rate.

(2) The same solution should apply to an arrestment in execution of an extract decree, with the modification that the list of sums to be aggregated should be as follows:

(i) the principal sum decerned for;

(ii) the judicial expenses decerned for in the extract decree;

(iii) the expenses of executing the arrestment;

(iv) a sum to be prescribed by statute (updated by statutory instrument) to cover the expenses of a possible action of furthcoming;

(v) the cumulo interest on the principal sum accrued up to a date specified in the arrestment schedule, (being a date occurring not later than the date of execution of the arrestment) together with a sum so specified equivalent to one year's interest at the rate authorised by the extract decree (to cover the possibility of further delay in payment or recovery by furthcoming).

An arrestment enforcing an extract registered document of debt would be in the same terms but excluding item (ii).

(3) The statutory limit should not apply to arrested moveable property (corporeal or incorporeal) other than a pecuniary debt.

(4) In any case where the arrestee is liable in a pecuniary debt to the defender or common debtor and also possesses other moveable property belonging to the defender or common debtor, then if, and only if, the arrestee's pecuniary debt is less than the sums specified in the arrestment schedule as thereby arrested, the arrestment should have the effect of attaching the other moveable property.

(5) Where an arrestment on the dependence secures a claim of debt whose currency of account is a foreign currency, the principal sum and interest specified in the schedule of arrestment should be the amount of sterling required to purchase the amount of the principal sum and interest expressed in foreign currency, at the buying rate of the foreign currency on the date (or last business day) immediately preceding the date of execution of the arrestment.

(6) The foregoing conversion rate should be applicable only for the purpose of determining the amount of money attached by the arrestment.

(7) A schedule of arrestment in execution of an extract decree, in specifying the amount of principal sum and interest thereby arrested, should give effect to the conversion rate provided for by the decree.

(8) In the case of an extract registered document of debt expressed in foreign currency, the conversion to sterling should be at the rate obtaining on the day immediately preceding the date of execution of the arrestment.

(9) Where an arrestment (whether on the dependence or in execution) attaches a pecuniary debt due by the arrestee to the defender or common debtor, and the currency of account of that debt is a foreign currency, the arrestment should have the effect of attaching in the arrestee's hands such an amount of the foreign currency as would, at the buying rate of sterling at the date of

execution of the arrestment, realise the amount in sterling specified in the schedule of arrestment as being thereby arrested.

(Para. 2.163).

Ranking of diligence on dependence in other processes

14.

(1) Where a creditor arresting on the dependence claims a ranking in an action of multiple-poinding, the court entertaining the multiple-poinding should have power to make any of the following orders, namely:

(a) an order delaying distribution of the fund in medio until the creditor's action for payment is finally disposed of;

(b) an order allowing distribution in disregard of the arrestment on the dependence, if the court is satisfied that the creditor has unduly delayed in pursuing his action;

(c) an order as at (a) above coupled with an order recalling the arrestment on the dependence and taking effect on the expiry of a specified period unless the creditor obtains decree for payment within that period;

(d) an order requiring consignation of sufficient funds to meet the amount or likely amount of the creditor's

claim and authorising an interim distribution to the other competing creditors; and

(e) an order authorising distribution of the fund in disregard of the creditor's arrestment on the dependence reserving the creditor's right of recovery from the other creditors and requiring the other creditors to find caution to secure that right.

(2) Views are invited on whether similar provision is necessary or desirable in insolvency proceedings.

(Para. 2.169).

Ranking of inhibitions on dependence

15.

Should Proposition 14 above apply to inhibitions on the dependence?

(Para. 2.171).

Negative prescription of diligence on dependence

16.

(1) The Debtors (Scotland) Act 1838, s. 22, should be replaced by a new statutory provision setting out clearly the law on the negative prescription of arrestments on the dependence and other arrestments, on the following lines.

(2) An arrestment on the dependence of an action should (if not insisted in) prescribe on the expiry of 3 years after the date when the decree for payment was extracted, unless the debt is future or contingent and the time for payment does not arrive till after that date, in which event paragraph (4) below should apply.

(3) An arrestment in execution of an extract decree for payment of a debt presently due, or other extract registered document relating to such a debt, should (if not insisted in) prescribe on the expiry of 3 years from the date of execution of the arrestment.

(4) An arrestment enforcing a future debt or a contingent debt should (if not insisted in) prescribe on the expiry of 3 years after the date when the debt becomes payable.

(Para. 2.178).

Recall and restriction of diligence on dependence: jurisdiction

17.

(1) All applications for recall or restriction of arrestments and inhibitions under Court of Session warrants (in particular warrants made after final extract) should be made in the first instance to the Outer House, unless the action is already before the Inner House on a reclaiming motion.

(2) In a sheriff court ordinary cause it should be competent to make an application for recall or restriction of diligence on the dependence:

(a) before tabling by letter to the sheriff clerk on the model of the corresponding Court of Session procedure under RC 74(g); and

(b) after tabling by intimated motion.

The provisions of section 21 of the Debtors (Scotland) Act 1838 should be repealed so far as inconsistent with this proposal.

(3) Views are invited on whether in sheriff court summary causes the procedure in applications for recall or restriction of diligence on the dependence should be simplified.

(Para. 2.188).

Title to apply for recall of arrestments on dependence

18.

(1) A person other than a defender who has a title to apply for the recall or restriction of an arrestment on the dependence of a sheriff court ordinary or summary cause action should have a title to make the application to the sheriff, by incidental proceedings in the depending action. It should no longer be necessary, and should cease to be competent, to make the application to the Inner House of the Court of Session.

(2) Where the thing arrested is a sum of money, should the arrestee have a title to apply for recall?

(3) Should it be made clear by statute that a third party claiming ownership of an arrested vessel and a fourth party claiming ownership of other types of arrested subjects, have a title to apply for recall or restriction of the arrestment, without prejudice to the court's power to dismiss or refuse the application on the ground that a proof is required and would be inappropriate, or that all interested parties have not been convened in the process?

(Para. 2.198).

Title to apply for recall of inhibition on dependence

19.

It should be made clear by statute that a person other than the debtor or defender having a title and interest to apply for recall or restriction of an inhibition on the dependence may make an incidental application in the depending action in the Court of Session or, if warrants for inhibition are in future to be granted in the sheriff court, in that court, as the case may be.

(Para. 2.201).

Powers of recall and restriction of diligence on dependence, and liability of cautioner

20.

(1) The court should continue to possess a wide discretionary power to make any of the following orders:

(a) an order restricting or recalling specified arrestments, which have been used on the dependence, in the hands of specified arrestees (a restriction or a special recall);

(b) an order recalling all arrestments which have been used on the dependence without specifying them and also rendering ineffectual (whether in the form of a prohibition, or a prospective discharge or a prospective recall) any arrestments which may in future be used on the dependence of the same action under the same warrant (a general recall);

(c) an order effecting a restriction or a special recall of specified arrestments on the dependence already used, with or without a general recall of any other unspecified arrestments already used, and a general recall of arrestments on the dependence which may be used in future under the same warrant (a restriction or a special recall combined with a general recall);

(d) an order restricting or recalling a warrant for inhibition on the dependence, whether or not the inhibition has been registered in the personal register.

The court should also continue to possess ancillary powers to attach conditions to the grant, or the refusal to grant, any such order, or any variation or recall of any such order as is mentioned at para (4) below, including:

(i) conditions as to caution or consignation; and

(ii) conditions designed to achieve the same result as a loosing of arrestments as proposed at Proposition 23 (para.2.263) below.

(2) The foregoing powers should be exercisable by the courts having regard to the statutory principles proposed above for the grant of warrants for diligence on the dependence and, subject to those principles, having regard to the grounds for recall or restriction under the existing law, which should remain undefined by statute.

(3) The court should also possess a power to recall a purported warrant for arrestment on the dependence on the ground of its invalidity.

(4) The court should have power (exercisable with or without conditions):

(a) to vary an order restricting an arrestment on the dependence;

(b) to vary or recall an order rendering ineffectual future arrestments on the dependence;

(c) after the recall of a warrant for inhibition on the dependence, to grant a new warrant for inhibition on the dependence; and

(d) to vary or recall any ancillary conditions,

in any case where there has been a material change in circumstances since the previous order was made, or material circumstances are disclosed, which were not previously disclosed, to the court.

(5) No change should be made in the rules regulating the liability of a cautioner in a special recall or restriction and the liability of a cautioner in a general recall.

(6) The foregoing proposals relating to arrestments on the dependence should apply to arrestments in rem of a ship.

(Para. 2.229).

Expenses of recall and restriction

21.

(1) Where an arrestment or inhibition on the dependence is recalled or restricted on caution or consignation, without opposition by the pursuer, and the diligence was properly used in the circumstances, should the rule be:

(a) that the applicant for recall or restriction should bear the expenses of the application; or

(b) that the question of expenses should be reserved and that the right to expenses should follow success in the action?

(2) Where diligence on the dependence is recalled or restricted in an incidental application in the depending action, (as distinct from the separate process of a petition for recall or restriction) should it be necessary for the court to reserve the question of the expenses of the application expressly in order to enable expenses to be dealt with at a later stage?

(3) What rule should apply to liability for the expenses of registering the recall or restriction of an inhibition in the personal register?

(Para. 2.241).

Appeals

22.

(1) It should be competent to appeal against a sheriff's decision in an application for recall or restriction or loosing of diligence on the dependence or in rem without the leave of the sheriff though the decision was made on an incidental motion.

(2) Do the provisions on appeals or reclaiming motions against judgments disposing of applications for recall, restriction or loosing of arrestments on the dependence or in rem operate satisfactorily in practice?

(Para. 2.243).

Loosing of arrestments

23.

(1) Letters of loosing arrestments (whether in security, on the dependence, in rem or in execution) should be abolished and the Arrestments Act 1617 (clerk of court to receive caution when receiving bill for letters of loosing) should be repealed.

(2) Views are invited on whether the courts should have power, in an application for recall, restriction or loosing of arrestments on the dependence, of subjects other than a ship or its cargo to make an order loosing an arrestment which should have the effect, subject to such conditions as the court thinks fit including conditions as to caution or consignation, of authorising the defender to uplift the subjects and requiring the arrestee, at the defender's request, to make the subjects forthcoming to the defender at the defender's expense?

(3) If loosing is retained as mentioned above, it should be provided by statute that where an order is made loosing an arrestment:

(a) the arrestment should cease to have effect if and when the arrested subjects are uplifted in pursuance of the loosing;

(b) until such uplifting, the arrestment should retain its preference (if any) in any process of ranking; and

(c) the defender's right to uplift and the obligation of a cautioner to make the subjects forthcoming should cease to have effect if, before the subjects are uplifted,(i) they are attached by another arrestment or diligence, or (ii) insolvency proceedings (a sequestration; liquidation; or attachment of a floating charge) against the defender have supervened; or (iii) the defender has granted a trust deed for creditors.

(4) Whether or not judicial loosing of arrestments of subjects other than ships is retained, the court should possess, or continue to possess, power, in an application for recall, restriction or loosing, to loose an arrestment on the dependence or an arrestment in rem of a ship or its cargo. An order loosing an arrestment of that type should be defined by statute as an order authorising the applicant or his nominee to move the ship or the cargo or both from the place where it is situated for such purposes and subject to such conditions, and to such further order, if any, as the court thinks fit, including conditions as to caution or consignation.

(5) Should the power of the sheriff clerk to loose arrestments under rule 48 of the Summary Cause Rules be abolished?

(Para. 2.263).

Adjudication on dependence and in security

24.

(1) Adjudications on the dependence should not be introduced in Scots law.

(2) The diligence of adjudication in security of future or contingent debts should be abolished.

(Para. 2.266).

Diligence in security of debts constituted by liquid documents of debt

25.

(1) Letters of inhibition and letters of arrestment should be abolished.

(2) The Court of Session on petition and the sheriff on summary application should have power to grant warrant for arrestment and inhibition in security of a future or contingent debt due under a decree or extract registered document of debt on the same grounds and subject to the same conditions as under our proposals the courts may grant warrant for arrestment and inhibition on the dependence for debts already due and, in terms of Proposition 7, future and contingent debts. The proposals on warrants for diligence,liability for wrongful diligence and related matters in Propositions 3 to 6 above should apply accordingly.

(Para. 2.269).

Admiralty arrestments and jurisdiction (Part III)

Definition of Admiralty causes

26.

(1) Admiralty causes in Scots law should be defined by reference to the list of claims specified in the Administration of Justice Act 1956, section 47(2) (which restricts the competence of Admiralty arrestments to arrestments securing claims specified in that list).

(2) The definition should apply expressly for the purposes of the Admiralty jurisdiction of the sheriff court as well as that of the Court of Session.

(3) It is suggested that the definition should be embodied in primary legislation.

(Para. 3.15).

Jurisdiction of sheriff court in salvage actions

27.

The sheriff court should continue to possess jurisdiction to entertain actions relating to salvage under the Sheriff Courts (Scotland) Act 1907, s. 4, but free of the restrictions on that jurisdiction imposed by section 547 of the Merchant Shipping Act 1894 (actions for determining disputes as to the amount of salvage) which should be repealed so far as it applies to Scotland.

(Para. 3.20).

Sheriff court procedure in Admiralty actions

28.

Separate rules of court (modelled on RC 135-147) governing procedure in Admiralty actions in the sheriff court should be introduced.

(Para. 3.22).

Sheriff court arrestments in rem and actions in rem

29.

(1) It should be clearly provided by statute that a warrant to arrest in rem a ship or other maritime res granted by a sheriff court should only be capable of execution within the jurisdiction of that sheriff court.

(2) Further, it should not be competent to circumvent the foregoing rule by obtaining a warrant of concurrence from the sheriff clerk of a different sheriff court, and accordingly warrants of concurrence relating to arrestments in rem should be incompetent.

(3) Section 4 of the Sheriff Courts (Scotland) Act 1907, (which inter alia confers on the sheriff Admiralty jurisdiction in maritime causes and proceedings, provided that the defender is amenable to the sheriff's jurisdiction) should be

amended to make it clear that the sheriff's jurisdiction in an Admiralty action in rem directed against a ship or cargo is founded on an arrestment in rem of the ship or cargo notwithstanding that the owners or persons interested in the ship or cargo are not, or not otherwise, amenable to the sheriff's jurisdiction.

(Para. 3.26).

Arrestment in rem enforcing maritime lien

30.

(1) Warrants for arrestment in rem of ships and other maritime property in Admiralty actions in rem enforcing maritime liens should continue to be available to pursuers as of right at the stage of signeting the summons by which the action is begun.

(2) It is suggested that provision should be made by act of sederunt to enable the court, in an Admiralty action in personam, on the application of the pursuer, to grant warrant for an arrestment in rem and orders authorising the pursuer to take steps to convert the action in personam into a combined action in rem and in personam.

(3) Is any legislative provision necessary or desirable to amend or clarify the procedure for enforcing a maritime lien against freight? In particular, should it be competent for the pursuer in an action in rem enforcing a lien encumbering freight to arrest in rem the freight in the hands of the person liable to pay the freight?

(4) Should a maritime lien encumbering freight be enforceable against freight though not enforceable against the ship?

(Para. 3.48).

Arrestment in rem under Administration of Justice Act 1956, s. 47(3)(b) securing non-pecuniary claim

31.

(1) Where in proceedings having a non-pecuniary conclusion for enforcement of a claim mentioned in paras (p) to (s) of section 47(2) of the Administration of Justice Act 1956 in which the claimant is not entitled to a maritime lien over the ship concerned:

(a) the claimant executes an arrestment in rem of the ship under section 47(3)(b) of that Act; and

(b) the warrant to arrest in rem was granted by a clerk of court in the ordinary course of process and not by a Lord Ordinary or sheriff in the exercise of a discretion such as we mention in para (2) of this Proposition,

then the claimant should be liable in damages for wrongful diligence if he fails to obtain the decree whose implementation the arrestment in rem secures.

(2) In such proceedings, the court should have a discretionary power, exercisable on the claimant's application, to grant warrant for an arrestment in rem of the type mentioned in

section 47(3)(b) of the 1956 Act. Where the claimant then executes the arrestment competently and in a formally regular manner but thereafter fails to obtain the decree whose implementation the arrestment in rem was intended to secure, he should be liable in damages for wrongful diligence if the court was misled into granting the warrant by either:

(a) a material factual statement by the claimant which he knew or ought to have known was untrue; or

(b) the claimant's failure to disclose to the court material facts within his knowledge.

(Para. 3.54).

Arrestment on the dependence of Admiralty actions in personam

32.

(1) The Administration of Justice Act 1956, s. 47(3)(a), (which provides for the arrestment of a ship on the dependence of an action to enforce a claim specified in paras. (p) to (s) of s. 47(2) of that Act), should be amended so that the reference to a ship includes a reference to a share in a ship.

(2) The 1956 Act, section 47(1)(a) (which makes it competent to arrest in certain circumstances a ship on the dependence if it is the ship with which the depending action is concerned) should be amended to make it clear that the arrestment is competent only if the defender is

the owner of a share in the ship at the time of the execution of the arrestment.

(3) The 1956 Act, s. 47(1)(b) (which makes it competent to arrest on the dependence a ship where all the shares in the ship are owned by the defender) should be amended to make it clear that not more than one ship may be arrested to secure the same debt.

(Para. 3.64)

Arrestment of ship and cargo on dependence discretionary remedy

33.

If our proposal in Proposition 2 (para. 2.69) for introducing the discretionary judicial grant of warrant for diligence on the dependence is accepted, then the same solution should apply in relation to the grant of a warrant for arrestment of a ship or her cargo on the dependence of an Admiralty action in personam. Propositions 3 at para. 2.79; 4 at para. 2.90; 5 at para. 2.92; 6 at para. 2.101; and 7 at para. 2.105, should apply accordingly.

(Para. 3.70).

Ancillary warrants and orders

34. Is there a need for legislation to clarify the law on the competence of warrants to take possession of ships which have sailed in breach of arrestment or to improve the sanctions for breach of arrestment in such cases?

(Para. 3.77)

Arrestment of cargo on board ship

35.

(1) No change should be made in the common law rule under which cargo on board a ship may be arrested but cannot be competently poinded.

(2) Section 47 of the Administration of Justice Act 1956 should be amended to make it clear that the restrictions which it imposes on property on the dependence of an action do not apply to an arrestment on the dependence of cargo on board a ship.

(3) It should be made clear by statute that it is competent to arrest cargo on board a ship where the cargo is in the possession of the defender or his servants or employees.

(4) It is suggested that no legislation is necessary to clarify the proper arrestee in whose hands cargo on board a ship should be arrested.

(5) It is suggested that it should not be competent to arrest cargo on board a vessel on passage.

(6) Should edictal service of an arrestment of cargo on board a vessel be abolished?

(7) Should an arrestment of cargo on board a ship, in dry dock or at a recognised anchorage, have, until the arrested cargo is unloaded, the same effect in immobilising the ship as the arrestment of the ship herself would have, subject to the powers of the court to grant ancillary warrants and orders as to the dismantling and movement of the ship, and as to the unloading of the cargo?

(Para. 3.96).

Arrestment of ships and their cargo on Sundays

36.

(1) The common law rule rendering ineffectual diligence executed on a Sunday should be abrogated or modified insofar as it applies to the arrestment of ships or of cargo on board ships, whether on the dependence, in rem, in execution or to found jurisdiction.

(2) Views are invited on whether the rule, in its application to ships and cargo on board ships, should be:

(a) abrogated absolutely; or

(b) retained but subject to a new power of the court to dispense with the rule on cause shown.

We provisionally prefer option (a).

(Para. 3.100).

Incidence of liability for expenses of arrestment and sale of a ship and of recall of arrestment

37.

(1) The rules relating to the expenses of an arrestment on the dependence should apply in relation to the arrestment on the dependence of a ship.

(2) The expenses of an arrestment in rem to enforce a maritime lien and the expenses of sale should continue to be recoverable as part of the expenses of the action in rem.

(3) The expenses of an arrestment in rem under s. 47(3)(b) of the Administration of Justice Act 1956 should be discretionary.

(4) The rules relating to the expenses of recall or restriction of an arrestment on the dependence should apply in relation to the restriction and recall of an arrestment on the dependence or an arrestment in rem of a ship.

(Para. 3.105).

Completion of diligence by sale or furthcoming

38.

(1) In a judicial sale under RC 143 of a ship arrested on the dependence of an Admiralty action in personam, should the court have, or continue to have, power to pronounce an order freeing the purchaser's title of all incumbrances?

(2) RC 143 should be amended to make it clear that the Deputy Principal Clerk (or the sheriff clerk, as the case may be) has power to effect a sale of an arrested ship, or (in the case of cargo arrested in rem) the cargo, by private bargain instead of public roup.

(3) RC 143 should be amended to make it clear that it does not apply to the sale of cargo arrested on the dependence of an Admiralty action in personam.

(Para. 3.114).

Proposed repeal of Merchant Shipping Act 1894, s. 565

39.

Section 565 of the Merchant Shipping Act 1894 (jurisdiction of Court of Session in salvage actions) should be repealed as unnecessary, but saving the jurisdiction of the Court of Session in salvage actions under the Court of Session Act 1830, s.21.

(Para. 3.139).

Territorial limits on Admiralty jurisdiction and on the competence of Admiralty arrestments

40.

(1) The legal definition of the territorial limits on the landward side of Admiralty jurisdiction for the purpose of determining the place where a cause of action must arise if the action is to be treated as an Admiralty action, is uncertain in Scotland and (it is thought) England and Wales. Any long term proposals for legislative reform, however, should properly be advanced by an advisory body with United Kingdom terms of reference.

(2) Subject to paras (3) and (4) below, it should be provided by statute that an arrestment of a ship or her cargo, whether:

(a) in rem; or

(b) on the dependence of an Admiralty or ordinary action in personam; or

(c) in execution of decree in an action in personam (whether an Admiralty action or an ordinary action for payment),

may be competently executed wherever the ship or cargo is situated within Scotland, whether in tidal or non-tidal waters or on land below or above the flood-mark.

(3) However, an arrestment of a ship's cargo in the owner's possession:

(a) on the dependence of an Admiralty or ordinary action in personam; or

(b) in execution of decree in an action in personam (whether an Admiralty action or an ordinary action for payment),

should only be competent while the cargo is on board the ship, without prejudice to the pursuer's or creditor's right to arrest cargo, which has been landed or transhipped, in the hands of a third party in terms of RC 140(b).

(4) Nothing in the foregoing proposals should affect the rule that the arrestment of a ship which is afloat may be executed while the ship is at anchorage and not while she is on passage.

(Para. 3.168).

The definition of 'ships' or 'vessels' attachable by Admiralty arrestments

41.

For the purposes of Admiralty jurisdiction and arrestments under Scots law, the concept of "ship" should be defined as including "any vessel capable of navigation", omitting the qualification "not propelled by oars". The concept of "sea-going ship" should not be used.

(Para. 3.181).

Admiralty jurisdiction over aircraft

42.

(1) In section 47(1) of the Administration of Justice Act 1956 (restrictions on competence of arrestment of ships), the reference to a ship should be defined as including a reference to an aircraft, in cases relating to salvage, towage and pilotage of aircraft.

(2) The 1956 Act section 48(e) (definition of claims arising out of salvage) should be amended so as to refer to claims under the Civil Aviation Act 1982, s. 87 (which applies to aircraft the law of wreck and salvage of ships).

(3) Provision should be made by statute, supplementing the 1956 Act, s. 48(f) (definition of "towage" and "pilotage" in relation to aircraft), making it clear that:

(a) the law of towage and pilotage applies to aircraft while waterborne as it applies to vessels; and

(b) claims in respect of the towage and pilotage of waterborne aircraft are enforceable by way of Admiralty action in personam, and by arrestment in the hands of the defender or debtor.

(4) Except in cases of salvage, towage and pilotage of aircraft in the maritime territory, Admiralty procedures and arrestments should not apply to aircraft.

(5) It should be competent for a creditor who proposes to poind an aircraft, to apply, before executing the poinding, for an order for dismantling the aircraft exercisable at or after the execution of the poinding, without prejudice to the creditor's right to apply after the execution of the poinding for such an order under the Debtors (Scotland) Act 1987, s. 21(1)(b).

(Para. 3.194).

Admiralty jurisdiction over hovercraft

43.

The definition of Admiralty causes competent in the Scottish courts in RC 135, or in any enactment replacing it, should be adapted so as to apply to hovercraft.

(Para. 3.199).

Interim attachment on the dependence of corporeal moveables in the defender's possession (Part IV)

44.

(1) It should be competent for the court to make an order granting warrant for the attachment of specified moveable goods in the defender's possession on the dependence of an action for payment, which would normally have effect for a prescribed period, after the extract of the decree for payment, to allow time for the pursuer to poind the goods. This new form of diligence may, for short, be called an interim attachment.

(2) The warrant for interim attachment, and the schedule of interim attachment implementing the warrant, should specify the particular moveable goods affected by the attachment with sufficient precision to leave the defender in no reasonable doubt as to what moveables are attached.

(3) A warrant for interim attachment should only be granted by a judge (Lord Ordinary or sheriff) in accordance with the principles and procedures set out in Part II for the discretionary grant of warrants for diligence on the dependence, with any necessary modifications. (See Propositions 2(2) at para 2.69; 3 at para 2.79; 4 at para 2.90; 5 at para 2.92; 6 at para 2.101; and 7 at para 2.105).

(4)

(a) The interim attachment should be effected by the service of a schedule of interim attachment in a form prescribed by act of sederunt.

(b) The modes of service should be the same as in the service of a schedule of arrestment.

(5) The interim attachment should have the same effect as an arrestment or poinding in rendering the affected corporeal moveables litigious, and in giving the pursuer a preference, by virtue of the nexus imposed on the moveables, in any insolvency proceedings or other process of ranking on the defender's estate.

(6) Only poindable subjects should be liable to interim attachment. The following categories of corporeal moveables should be exempt from interim attachment, namely:

(a) articles specified in the Debtors (Scotland) Act 1987 section 16(1) (which exempts certain articles wherever situated from poinding) irrespective of the value of the articles, and accordingly the monetary limits on the exemptions in paragraphs (b) and (d) of section 16(1) should not apply to exemptions from interim attachment;

(b) all articles belonging to the defender located in a dwelling-house (whether the defender's or a third party's) or its curtilage at the time of execution of the interim arrestment or at such other time as may be specified by the court in the warrant (except possibly a vehicle); and

(c) articles of a perishable nature or likely to deteriorate substantially and rapidly in condition or value.

(7) Views are sought on whether the following articles should be exempt from interim attachment, namely:

(a) a mobile home, such as a caravan or houseboat, which is the only or principal residence of the defender;

(b) corporeal moveables owned in common (pro indiviso) by the defender and a third party; and

(c) a vehicle of the defender within the curtilage of a dwelling-house.

(8) It should be competent for the court to make interim orders (on incidental motions or, after extract, incidental applications in the interim attachment process) as to the security or location of corporeal moveables subject to interim attachment, including orders allowing temporary removal from the jurisdiction and orders granting warrant to dismantle.

(9) While the action is in dependence, the rules and procedures relating to the restriction and recall of arrestments and inhibitions on the dependence should apply with any necessary modifications to the recall and restriction of interim attachments. Where the interim attachment continues in effect after decree for payment, recall should be granted only on the more limited grounds on which an arrestment in execution may be recalled.

(10) It should be competent for the court, on an incidental motion or, after extract, an incidental application in the interim attachment process, to pronounce an order finding whether particular goods are affected by the interim attachment.

(11) An interim attachment should cease to have effect (generally or in relation to particular articles):

(a) on judicial recall of the interim attachment;

(b) on the pursuer extra-judicially releasing goods from the interim attachment;

(c) when the action of payment is finally disposed of in the defender's favour and decree of absolvitor or dismissal has been granted;

(d) on the lapse of (say) 6 months after the extract of the decree for payment; or

(e) on the execution of a poinding of the articles subject to the interim attachment.

(12) The rules as to the expenses of execution, recall and restriction of arrestments on the dependence should apply in relation to interim attachment.

(13) Breach of an interim attachment should be punishable as a contempt of court.

(14) Section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, section 185 (which relate to the effect of sequestration and liquidation in rendering ineffectual arrestments and poindings executed within 60 days prior to the date of sequestration or the commencement of the winding up of a company) should apply to interim attachments. Where an interim attachment of goods prior to the 60 days period is followed up by a poinding of those goods within that period, the creditor should nevertheless remain entitled to the preference derived from the interim attachment.

(15) The power of the court to sist, recall or restrict arrestments under the Debtors (Scotland) Act 1987, Part I, should apply in relation to interim attachments as mentioned in paragraph 4.40 above.

(Para. 4.41).

APPENDIX

ENACTMENTS ON ADMIRALTY ACTIONS AND ARRESTMENTS

Rules of Court of Session, 1965

Definition of Admiralty causes

135. Admiralty causes include causes arising out of:—

(i) Claims for possession of a ship, or the earnings of a ship, or the protection of the interests of one or more co-owners as against the others to enable a ship to be employed, the examination of accounts between the co-owners, or the apportionment of the earnings of a ship after such examination;

(ii) Claims or disputes in regard to mortgages of ships or shares in a ship;

(iii) Contracts of bottomry and *respondentia*;

(iv) Claims under contracts of affreightment, charter-parties and bills of lading;

(v) (*a*) Loss of life or personal injury and (*b*) loss of or damage to property arising out of collisions at sea;

(vi) Claims by owners of cargo for damage occurring to cargo;

(vii) Claims for limitation of liability;

(viii) Pilotage;

(ix) Civil salvage;

(x) Claims for necessaries;

(xi) Towage;

(xii) Masters' and seamen's wages and disbursements;

(xiii) General average;

(xiv) Forfeiture of ships to the Crown;

(xv) Marine insurance;

(xvi) Maritime liens.

All such causes shall be initiated in the Outer House by summons on the official printed form, and shall conform to the provisions of Rule 70, except as otherwise provided by any of the Rules of this Chapter.

Administration of Justice Act 1956

Arrest of ships on the dependence of an action or in rem

47.—(1) Subject to the provisions of this section and section 50 of this Act, no warrant issued after the commencement of this Part of this Act for the arrest of property on the dependence of an action or *in rem* shall have effect as authority for the detention of a ship unless the conclusion in respect of which it is issued is appropriate for the enforcement of a claim to which this section applies, and, in the case of a warrant to arrest on the dependence of an action, unless either—

(*a*) the ship is the ship with which the action is concerned, or

(*b*) all the shares in the ship are owned by the defender against whom that conclusion is directed.

(2) This section applies to any claim arising out of one or more of the following, that is to say—

(*a*) damage done or received by any ship;

(*b*) 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, unloading 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;

(*c*) salvage;

(*d*) any agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(*e*) any agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(*f*) loss of, or damage to, goods carried in any ship;

(*g*) general average;

(*h*) any bottomry bond;

(*i*) towage;

(*j*) pilotage;

(*k*) the supply of goods or materials to a ship for her operation or maintenance;

(*l*) the construction, repair or equipment of any ship;

(*m*) liability for dock charges or dues;

(*n*) liability for payment of wages (including any sum allotted out of wages under section 141 of the Merchant Shipping Act 1894, or adjudged under section 387 of that Act by a superintendent to be due by way of wages) of a master or member of the crew of a ship;

(*o*) master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(*p*) any dispute as to the ownership or right to possession of any ship or as to the ownership of any share in a ship;

(*q*) any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;

(*r*) the mortgage or hypothecation of any ship or any share in a ship;

(*s*) any forfeiture or condemnation of any ship, or of goods which are being, or have been, carried, or have been attempted to be carried, in any ship, or for the restoration of a ship or any such goods after seizure.

(3) In any proceedings having a conclusion appropriate for the enforcement of any claim such as is mentioned in paragraphs (*p*) to (*s*) of the last preceding subsection a warrant may be issued—

(*a*) if the conclusion is a pecuniary conclusion, for the arrest of the ship on the dependence of the action; or

(*b*) in any other case (whether or not the claimant is entitled to a lien over the ship), for the arrest of the ship *in rem*;

but there shall not be issued in respect of any such conclusion as aforesaid (whether pecuniary or otherwise) a warrant to arrest, either in rem or on the dependence of the action, any ship other than the ship to which the conclusion relates.

(4) Subject to the preceding subsection, nothing in this section shall be taken to authorise—

(*a*) the use of an arrestment on the dependence of an action otherwise than in respect of a pecuniary conclusion, or

(*b*) the use of an arrestment in rem otherwise than in respect of a conclusion appropriate for the making good of a lien.

(5) A warrant for the arrest of a ship *in rem* issued by virtue of paragraph (*b*) of subsection (3) of this section in a case where the person in whose

favour it is issued is not entitled to a lien over the ship shall have effect as authority for the detention of the ship as security for the implementation of the decree of the court so far as it affects that ship:

Provided that the court may, on the application of any person having an interest, recall the arrestment if satisfied that sufficient bail or other security for such implementation has been found.

(6) Nothing in this section shall authorise the arrest, whether on the dependence of an action or in rem, of a ship while it is on passage.

(7) Nothing in this section shall authorise the arrest, whether on the dependence of an action or *in rem*, of a ship in respect of any claim against the Crown, or the arrest, detention or sale of any of Her Majesty's ships or Her Majesty's aircraft.

In this subsection "Her Majesty's ships" and "Her Majesty's aircraft" have the meanings assigned to them by subsection (2) of section 38 of the Crown Proceedings Act 1947.

(8) [Repealed by the Statute Law Revision Act 1963.]

Interpretation of Part V

48. In this Part of this Act, unless the context otherwise requires,—

(*a*) references to an action, a pursuer and a defender include respectively references to a counter-claim, the person making a counter-claim and the person against whom a counter-claim is made;

(*b*) any reference to a conclusion includes a reference to a crave, and "pecuniary conclusion" does not include a conclusion for expenses;

(*c*) any reference to a warrant to arrest property includes a reference to letters of arrestment and to a precept of arrestment;

(*d*) any reference to a lien includes a reference to any hypothec or charge;

(*e*) any reference to claims arising out of salvage includes a reference to such claims for services rendered in saving life from a ship or an aircraft or in preserving cargo, apparel or wreck as, under sections 544 to 546 of the Merchant Shipping Act 1894, or any Order in Council made under section 51 of the Civil Aviation Act 1949, are authorised to be made in connection with a ship or an aircraft; and

(*f*) the following expressions have the meanings hereby assigned to them respectively, that is to say—

"collision regulations" means regulations under section 418 of the Merchant Shipping Act 1894, or any such rules as are mentioned in subsection (1) of section 421 of that Act or any rules made under subsection (2) of the said section 421;

"goods" includes baggage;

"master" has the same meaning as in the Merchant Shipping Act 1894, and accordingly includes every person (except a pilot) having command or charge of a ship;

"ship" includes any description of vessel used in navigation not propelled by oars;

"towage" and "pilotage" in relation to an aircraft, mean towage and pilotage while the aircraft is waterborne.

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