ADMIRALTY JURISDICTION
(Part 1)

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That a judicial jurisdiction in Admiralty should have survived its long and tortuous history is testimony of its usefulness to maritime commerce. Indeed, Admiralty flourished in the United States when Constitutional foresight and judicial enterprise severed the jurisdiction from its historical restraints. Yet, in England, five hundred years of judicial confrontation and legislative tampering had eroded the jurisdiction and sentenced it to relative obscurity, until 20th century legislation restored some of its prestige. Following the English reforms implemented by the *Administration of Justice Acts* 1956 and 1970 (U.K.), New Zealand took the opportunity to reorganize her jurisdiction with the *Admiralty Act* 1973 (N.Z.). Australia, however, did not proceed with a proposal to update her colonial jurisdiction until now. Currently, a Bill is being prepared which may inject new life into Australian Admiralty in the 1980s. This article attempts to trace the historical misfortunes of Admiralty and thereby reveal the inadequacies of the present Australian jurisdiction.

EVOLUTION OF ADMIRALTY

The origin of the judicial jurisdiction[1] invested in the admirals of the English fleets is obscure,[2] but a distinctive curial function seems to have emerged in the 14th century[3] to entertain foreign claims over piracy spoils and prize.[4] Following English victory in the Battle of Sluys in 1340, a tribunal was established to administer the customs of the sea and Edward III appointed an admiral of all the fleets with authority to decide causes according to the maritime law.[5] In 1361, the King's Council confirmed

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1 On the history of Admiralty generally, see the material cited in the following footnotes.

2 W. Senior, "The First Admiralty Judges" (1919) 35 *L.Q.R.* 73, 74; D. W. Robertson, *Admiralty and Federalism* (Mineola, N.Y., Foundation, 1970) 37.

3 R. G. Marsden, *Select Pleas in the Court of Admiralty* (1894) Vol. I, xi-xlix; Vol. II, lvii-lxii; *R.* v. *Keyn* (1876) 2 Ex. D. 63, 167; cf. *The Zeta* [1892] P. 285, 300.

4 T. L. Mears, "The History of the Admiralty Jurisdiction" in *Select Essays in Anglo-American Legal History* (1968) Vol. II, 312, 319-20; F. R. Sanborn, *Origins of the Early English Maritime and Commercial Law* (N.Y., The Century Co., 1930) 271 et seq.

5 L. H. Laing, "Historic Origins of Admiralty Jurisdiction in England" (1946) 45 *Mich. L.R.* 163, 167-9.

that felonies, trespasses and injuries occurring on the sea should be tried by the admiral according to the law maritime and not adjudged by the common law[6] and 14th century records disclose proceedings in local courts being stayed in deference to the admirals' jurisdiction.[7] Yet, so zealous were the admirals and their deputies (judges) in their "bold bid for business"[8] that they encroached upon the privileges of the seaports[9] and the jurisdiction of common law courts.[10]

In an effort to curb their expansion and resist the proliferation of their Civil Law Codes,[11] a series of statutes restricted their jurisdiction to activities seaward of the coastline.[12] In 1389 it was decreed that the admirals "shall not meddle from henceforth of anything done in the realm, but only of a thing done upon the sea".[13] In 1391, it was enacted

> "that of all manner of contracts, pleas and quarrels, and all other things arising within the bodies of the counties, as well as by land as by water and also of wreck of the sea, the Admiral's Courts shall have no manner of cognizance, power nor jurisdiction."[14]

Nevertheless, the admiral was granted a criminal jurisdiction, concurrent with common law, over

> "the death of a man and of mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers."[15]

Continued abuse prompted the Commons to petition against the admiral[16] and in 1400 a statute was passed entitling a defendant, who was improperly subjected to admiralty jurisdiction, to

> "recover his double damages against the pursuant; and the same pursuant shall incur the pain of ten pounds to the King for the pursuit so made, if he be attained."[17]

Criminal Jurisdiction

In the 15th century, the business of the Admiral's judges was centralized enough to speak of a Court of Admiralty[18] and regular enough for civilians practising in the Court to form a collegiate foundation in London, later

6 Mears, op. cit. 329.
7 Marsden, op. cit. I, xlv-xlvi.
8 W. J. V. Windeyer, *Lectures on Legal History* (2nd ed. rev. Sydney, Law Book Co., 1957) 177.
9 W. Holdsworth, *A History of English Law* (1966) Vol. I, 548.
10 Laing, op. cit. 169-70.
11 Robertson, op. cit. 43.
12 See E. S. Roscoe, *Admiralty Jurisdiction and Practice* (1920) 6-8.
13 13 Rich. II, c. 5 (1389).
14 15 Rich. II, c. 3 (1391).
15 Ibid.
16 Mears, op. cit. 335; Roscoe, op. cit. 8.
17 2 Hen. IV, c. 11 (1400).
18 W. Senior, "Admiralty Matters in the Fifteenth Century" (1919) 35 *L.Q.R.* 290; Marsden, op. cit. I, li-lvi.

to be called the College of Doctors of Law.[19] Procedure was modelled on the Civil Law trial by witnesses whose numerical strength influenced the outcome of the case.[20] Unless the accused confessed his crime, no capital conviction could be secured without the supporting evidence of two witnesses. However, for fair reasons or foul, witnesses were frequently unavailable to testify about offences committed on board ship.[21] Dissatisfied with the absence of jury presentment and with the reputed practice of extracting confessions by torture, a 1536 statute required "all treasons, felonies, robberies, murders and confederacies" committed within Admiralty jurisdiction to be tried according to the common law by commissioners appointed by the King.[22] Although the formal division of jurisdictions was preserved[23] the criminal jurisprudence of Admiralty was thereafter eclipsed by the common law, because common lawyers were appointed as commissioners[24] and the common law was applied to British ships at sea.[25] By contrast, Admiralty's civil jurisdiction was to survive. However, two centuries of attrition were to reduce it to a skeleton of its Tudor importance.

Civil Jurisdiction

In the climate of expanding international trade, the High Court of Admiralty proved to be a convenient forum for 16th century merchants.[26] Despite the 14th century legislative restraints, the Court entertained a wide range of mercantile and maritime disputes involving bills of exchange, charter parties, insurance, general average, damage to cargo, freight, negligent navigation, unseaworthiness, collision and even marriage contracts and wills made abroad.[27] With such prestigious litigation at stake, common law courts set about undermining Admiralty's jurisdiction and capturing its business.[28] Yet, the curial competition was more than a contest between the Common and Civil Law systems. To Sir Edward Coke, when he assumed office as Chief Justice[29] (of Common Pleas in 1606 and

19 F. L. Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1880* (Cambridge University Press, 1970) Ch. 3.
20 T. E. Scrutton, "Roman Law Influence in Admiralty" in *Select Essays in Anglo-American Legal History* (1968) I, 208, 230 et seq.
21 4 Blackstone, Ch. 19, 5.
22 28 Hen. VIII, c. 15 (1536).
23 See *Lacyes Case* (1582) 1 Leon 270; 74 E.R. 246; *The Case of the Admiralty* (1610) 13 Co. Rep. 51; 77 E.R. 1461.
24 Holdsworth, op. cit. I, 551.
25 See *R.* v. *Allen* (1837) 1 Mood. C.C. 494; 168 E.R. 1357; *R.* v. *Serva* (1845) 1 Den. 104; 169 E.R. 169; *R.* v. *Anderson* (1868) L.R. 1 C.C.R. 161; *R.* v. *Keyn* (1876) 2 Ex. D. 63.
26 A. K. R. Kiralfy, *Potter's Historical Introduction to English Law* (4th ed. London, Sweet & Maxwell, 1962) 199; Holdsworth, op. cit. I, 555.
27 Marsden, op. cit. I, lxvii.
28 E. F. Ryan, "Admiralty Jurisdiction and the Maritime Lien" (1968) 7 *Western Ont. L. Rev.* 173, 176; G. F. Steckley, "Merchants and the Admiralty Court During the English Revolution" (1978) 22 *A.J. Legal History* 137.
29 For Coke's life in public office and political involvement, see C. D. Bowen, *The Lion and the Throne* (Boston, Little, Brown & Co., 1957); C. W. James, *Chief Justice Coke* (London, Country Life, 1929).

King's Bench in 1613) it represented the struggle for judicial supremacy of Parliamentary courts over Conciliar courts.[30] The Admiralty Court of the 16th century had exceeded its statutory jurisdiction in preference for the wider powers conferred on the Admiral by the King in Council.[31] The 1391 statute had excluded Admiralty from all "things rising within the bodies of the counties"[32] although in 1540 its jurisdiction was extended to the negligent handling of cargo and delay in prosecution of the voyage.[33] However, Crown patents appointing a succession of Lords High Admiral conferred jurisdiction over all contracts made beyond the sea, or contracted in England for performance beyond the sea, and matters occurring on the rivers in the realm from the first bridges to the sea.[34] Particularly irksome to Coke was the inclusion in the patents of *non obstante* clauses which purported to validate the Admiral's authority, notwithstanding any statutes to the contrary.[35]

Dissatisfied litigants challenged Admiralty's jurisdiction long before Coke's elevation to the bench. Extant records disclose applications for writs of *supersedeas* and *certiorari* to review proceedings in Admiralty.[36] However, achieving only moderate success in Chancery,[37] this procedure was superseded in the mid-16th century by the more popular application for *prohibition* to an amenable King's Bench.[38] On the other hand, there were instances of litigants retaliating by removing plaints from local and common law courts to Admiralty.[39] Nevertheless, common law orders to restrain proceedings so concerned the Admiral that in 1570 he complained to Elizabeth I who instructed the sheriffs in London to forebear from intermeddling with causes arising out of contracts upon and beyond the seas.[40] In 1575, an agreement was alleged to have been reached among

30 S. E. Thorne, "Courts of Record and Sir Edward Coke" (1937) 2 *Tor. L.J.* 24, 47-9; J. Mathiasen, "Some Problems of Admiralty Jurisdiction in the Seventeenth Century" (1958) 2 *A.J. Legal History* 215, 217; see *Prohibitions Del Roy* (1609) 12 Co. Rep. 63; 77 E.R. 1342; *Case of Proclamations* (1609) 12 Co. Rep. 74; 77 E.R. 1352.

31 Holdsworth, op. cit. I, 553-4.

32 15 Rich. II, c. 3 (1391).

33 32 Hen. VIII, c. 14, S. X; "if any merchant, stranger or other find himself aggrieved or damnified by negligent keeping of the said merchandises or wares or by long delaying or protracting of them and taking the voyage by the said owner, his factor, master or any the mariners of the said ship otherwise than shall be agreed betwixt the said merchant, his factor, attorney or servant and master or owner in or by the said charter party, not being letted by wind or weather, shall and may have his remedy by way of complaint before the Lord Admiral of England for the time being, his Lieutenant or Deputy against the said owner, master, governor or factors".

34 Marsden, op. cit. I, lvii-lix.

35 4 Coke 135; Marsden, op. cit. I, lix.

36 Marsden, op. cit. I, lxxiv-lxxx; II, xli-xlviii.

37 Ibid. II, xli.

38 Ibid. I, lxxiv-lxxx; II, xli-lvii.

39 Marsden, I, lxviii; *Sewell* v. *Norman* (1538) ibid. 75; *In re Hodgshone* (1539) ibid. 77; *Felton* v. *Wellys* (1538) ibid. 78 and the fascinating account of *Barker* v. *Maynard* (1531) ibid. II, xlii.

40 Robertson, op. cit. 52; Marsden, op. cit. II, xii; Laing, op. cit. 179.

judges of Admiralty and the common law courts resolving the demarcation of jurisdictions,[41] but Coke later denied its authenticity.[42] Neither jurisdiction was averse to using a fiction as a device to capture business from the other. Common law courts permitted the plaintiff to initiate proceedings on a contract made abroad by pleading the non-traversable fiction that the contract was executed in the body of the counties (*infra corpus comitatus*), most commonly in the parish of St. Mary-le-Bow in the Ward of Cheap.[43] To secure jurisdiction in Admiralty, libellants (plaintiffs) resorted to the averment of venue that contracts made on land were transacted on the high seas (*super altum mare*).[44]

Resorting to questionable arguments,[45] Coke advocated that Admiralty's jurisdiction was constrained to wrongs committed on the high seas and maritime contracts entered into on the high seas[46]—a limitation of crippling severity, which was implemented by removing plaints from Admiralty at the instance of the arrested defendant over whom common law courts could exercise personal jurisdiction. Deprived of its initiating process over defendants, Admiralty was compelled to rely on the arrest of ship and cargo to secure jurisdiction. However, Coke attempted to sabotage even this procedure by holding that the Court was not a court of record[47] and could not, therefore, accept recognizances when the ship or cargo owner posted bail for his goods' release. With the exception of the last ploy, whence originated the action *in rem*,[48] the downfall of prerogative courts and the triumph of common law over Stuart absolutism assured the ultimate success of Coke's views.

In 1632, after Coke's dismissal, an agreement was drawn up to moderate common law aspirations.[49] Though accepted by the Privy Council and approved by the King,[50] the compromise attracted little support on the bench.[51] However, it did influence the passage of Ordinances during the Commonwealth interregnum which preserved Admiralty's maritime, though

41 Robertson, op. cit. 54; Marsden, op. cit. II, xiii; Mears, op. cit. 353.
42 4 Coke 136; Marsden, op. cit. II, xiv.
43 4 Coke 132; 3 Blackstone, Ch. 7, 3; T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956) 663; Laing, op. cit. 180; Scrutton, op. cit. 234.
44 Scrutton, ibid.; Kiralfy, op. cit. 195; Marsden, op. cit. II, xlv.
45 See *Smart* v. *Wolff* (1789) 3 T.R. 323, 348; 100 E.R. 600, 613; *De Lovio* v. *Boit* 7 Fed. Cas. 418, 421 (1815).
46 *Colclough* v. *Hound* (1559) Marsden, op. cit. II, 108; *Thomlinson's Case* (1605) 12 Co. Rep. 104; 77 E.R. 1374; (1610) 2 Brown & Golds 16; 123 E.R. 789; *King of Spain* v. *Joliff* (1612) Hob. 78; 80 E.R. 228; *Palmer* v. *Pope* (1612) Hob. 79; 80 E.R. 229; *Bridgeman's Case* (1614) Hob. 11; 80 E.R. 162. See 4 Coke 134-47.
47 *Thomlinson's Case* (1605) 12 Co. Rep. 104; 77 E.R. 1379; *The Case of Admiralty* (1610) 13 Co. Rep. 51; 77 E.R. 1461; *Pane* v. *Evans* (1675) 1 Keb. 552; 83 E.R. 1108; *Sparks* v. *Martyn* (1680) 1 Vent. 1; 86 E.R. 1; 4 Coke 135. However, in the 14th century, common law had acknowledged the Court of Admiralty as a court of record, *Sampson* v. *Curteys* (1390), *Gernesey* v. *Henton* (1389), Marsden, op. cit. I, 1, 17.
48 See Ryan, op. cit. 173.
49 Robertson, op. cit. 60; Laing, op. cit. 181.
50 Mears, op. cit. 357-9.
51 See *Woodward* v. *Bonithan* (1661) Raym Sir T. 3; 83 E.R. 2.

not mercantile, jurisdiction.[52] The reprieve was short lived. After the restoration, attempts to perpetuate the arrangement by legislation failed[53] and by the 18th century the High Court of Admiralty was reduced to a shadow of its former self. Throughout the period of decline, civilians had urged a division of jurisdictions based on subject matter, allowing Admiralty to develop the commercial law nurtured by the civilians. But common law imposed limitations of territory and subject matter. It conceded to Admiralty wrongs committed on the high seas and maritime contracts transacted on the high seas. Mercantile contracts wheresoever executed and maritime contracts made on land were absorbed by common law, thus depriving commerce of the more sophisticated concepts and simpler procedures of the Civil Law. Admiralty did manage to wrest some exceptions from common law, principally suits for mariners' wages and foreign bottomry bonds.[54] In addition, Admiralty retained jurisdiction over salvage and prize cases which, arising on the high seas, did not encounter the degree of common law hostility directed at commercial contracts.

Droits Jurisdiction

Coke acknowledged Admiralty's jurisdiction over flotsam, jetsam and lagan retrieved from the sea.[55] However, wreck washed ashore and recovered from land was the exclusive province of common law. All casualties of the sea, including derelict ships and such exotic creatures as the whale, sturgeon, grampus and porpoise, whether washed ashore or salvaged from water, belonged to the King, being classed as estrays which wandered onto the King's domain.[56] Landholders could acquire the King's right to estrays found on their land by prescription or grant from the King, just as the King could grant away his right to sea-borne estrays, which he did to the Cinque Ports and the Lord Warden.[57]

It was customary for the Crown or other grantee to share his *droits* with the finder. From the 13th century, the owner of wreck washed ashore became entitled to reclaim his property within the statutory period of one year and one day,[58] subtracting a salvage reward for the finder.[59] If no claim were successful, the wreck was retained by the Crown. Apart from privileges granted to seaports,[60] the 1391 statute conferred exclusive

[52] C. H. Firth and R. S. Rait (ed.), *Acts and Ordinances of the Interregnum* (1972). I, 1120 (1648); II, 78 (1649), 712 (1653); Roscoe, op. cit. 15-18.
[53] Holdsworth, op. cit. I, 557; Mears, op. cit. 359.
[54] *Hook* v. *Moreton* (1698) 1 Ld. Raym 397; 91 E.R. 1165; cf. *Woodward* v. *Bonithan* (1661) Raym Sir T. 3; 83 E.R. 2.
[55] *Sir Henry Constable's Case* (1601) 5 Co. Rep.; 77 E.R. 218; and see *The King* v. *Two Casks of Tallow* (1837) 3 Hagg 294; 166 E.R. 414.
[56] R. G. Marsden, "Admiralty Droits and Salvage" (1899) 15 *L.Q.R.* 353.
[57] Marsden, op. cit. II, xix-xxxii; *Lord Warden of Cinque Ports* v. *King* (1831) 2 Hagg. 438; 166 E.R. 304.
[58] 3 Edw. I, c. 4 (1275).
[59] 27 Edw. III, st. 2, c. 13 (1353).
[60] 17 Edw. II, st. 1, c. 11 (1324).

jurisdiction on common law courts over claims for wreck.[61] From the 16th century it was customary for the Crown to grant *droits* of goods rescued from the sea to the Admiral in respect of which the Court of Admiralty exercised jurisdiction.[62] Although in the 17th century the Crown discontinued the practice of conferring his *droits* to the Admiral,[63] the Court retained jurisdiction over goods salvaged from the sea. Common law jurisdiction extended to the low water mark, whereas Admiralty was restricted to goods in or upon the sea. Goods floating between high and low water mark attracted Admiralty jurisdiction until they grounded on the ebb tide when common law assumed control.[64]

Prize and Spoils Jurisdiction

The disturbing incidence of piracy in the late 13th and early 14th centuries prompted the appointment of admirals to preserve the King's peace on the seas,[65] whence evolved the Court of Admiralty's civil and criminal jurisdiction over spoils captured at sea. In 1354 it was enacted that if any merchant be robbed of his goods at sea he may recover restitution upon proof of title, "without making other suit at the common law".[66] Subject to the claims of owners, ships and cargoes wrongfully seized at sea comprised *droits* of the Admiral. Property seized under commission of the Crown was forfeited to the Crown as lawful prize and usually shared with its captors. In times of war or reprisal, privateers could apply to Admiralty for Letters of Marque which would commission them to lawfully plunder the vessels of a foreign power as an act of war or act of reprisal for injuries suffered.[67] This infamous form of commission "did as much to foster piracy amongst English seamen as to check its practice by foreigners"[68] but it was a convenient and inexpensive means of maintaining a private navy.

Prize was an extremely profitable enterprise to Crown and captors. On the other hand an unlawful seizure could seriously embarrass the Crown. Interception of foreign vessels travelling under flags of truce or letters of safe conduct could provoke diplomatic repercussions with foreign powers and in 1414 wrongful arrest was declared to be "high treason done against the King's Crown and his Dignity".[69] Apparently dissatisfied with the performance of Admiralty, the statute authorized the appointment in each port of a "Conservator of the Truce and the Safe Conduct of the

[61] 15 Rich. II, c. 3 (1391).
[62] Marsden, op. cit. II, xxiv.
[63] Marsden, "Admiralty Droits and Salvage", op. cit. 358-9.
[64] *Sir Henry Constable's Case* (1601) 5 Co. Rep. 106a; 77 E.R. 218.
[65] For documents pertaining to prize and spoils, see R. G. Marsden, *Law and Custom of the Sea* (1915).
[66] 27 Edw. III, st. 2, c. 13 (1354).
[67] Sanborn, op. cit. 317-19; Marsden, op. cit. fn. 65.
[68] Laing, op. cit. 172 fn. 36.
[69] 2 Hen. V, st. 1, c. 6 (1414).

King", with power to inquire into and punish maritime offences as the admirals had done. Capital punishment, however, was reserved to the Admiral. Prize confiscated from the King's enemies was exempt from punishment but each capture had to be accounted for to the Conservator. Because it suppressed English reprisals, foreign vessels seized the opportunity to attack English vessels with impunity and in 1435 the statute was suspended for seven years.[70]

Complaints that masters could not identify ships carrying letters of safe conduct until captured, precipitated the statute of 1442 which required all letters of safe conduct to be enrolled in Chancery.[71] In 1450, the 1414 Ordinance was re-asserted but the jurisdiction of the Conservator was invested in the Chancellor and one of the Chief Justices.[72] This was followed in 1452 by a statute conferring civil jurisdiction over the restitution of spoils on the Chancellor and a Justice,[73] a jurisdiction which had been exercised by Admiralty in the 14th century. Statutes dealing with spoil were confirmed in 1474.[74] Evidently, the Chancellor was unable to cope with endemic piracy and the Court of Admiralty revived its claim to jurisdiction when, in 1498, one of a number of treaties between England and France resolved that spoil should be retained until adjudication by the Admiral.[75] The 16th century witnessed the golden age of privateering during which the office of Admiral was specially commissioned to condemn captured ships and cargo as lawful prize.[76] Comparatively untrammelled by common law prohibitions, the high seas jurisdiction of prize became entrenched in the High Court of Admiralty.

From the time of the restoration, the Court separated its prize sittings from the residue of its business, known as the instance jurisdiction, and by the 18th century prize jurisprudence had become so specialized that the Court sat in an independent capacity of a Prize Court which thereafter developed the law of prize in war as a branch of international law.[77] Admiralty was not granted jurisdiction over property forfeited for violation of trade and revenue laws unless the offending ship were captured as prize by a commissioned vessel.[78] In 1661, a statute regulating the conduct of naval personnel directed criminal offences to be tried by court martial but civil claims over prize to be adjudicated by the Court of Admiralty.[79] Likewise Admiralty retained cognizance of civil piracy suits. In 1670, a statutory right of action enabled merchants to recover compensation in

[70] 14 Hen. VI, c. 8 (1435).
[71] 20 Hen. VI, c. 1 (1442).
[72] 29 Hen. VI, c. 2 (1450).
[73] 31 Hen. VI, c. 4 (1452).
[74] 14 Edw. IV, c. 4 (1474).
[75] Holdsworth, op. cit. I, 563.
[76] See Marsden, op. cit. fn. 65, especially I, 254.
[77] *Lindo* v. *Rodney* (1783) 2 Dougl. 613, 614; 99 E.R. 385.
[78] See *American Foundation* p. 99 infra.
[79] 13 Cha. II, c. 9 (1661).

Admiralty from the carrying vessel if it did not resist seizure by pirates.[80] And in 1721, trading with pirates rendered ship and cargo liable to forfeiture in the High Court of Admiralty.[81]

AMERICAN FOUNDATION

The High Court of Admiralty dwindled in the 18th century as its instance business evaporated, save for its jurisdiction to condemn seizures. The 1536 statute governing offences at sea was affirmed in 1702[82] before which, in 1698, legislation was passed authorizing the appointment of commissioners to try maritime offences in the colonies and plantations of the Crown.[83] And it is to the Americas that the history of Admiralty shifts for its next stage of development. By the 18th century, a number of vice-admiralty courts had been established in British North America,[84] staffed by judges bearing commissions from the High Court of Admiralty under the supervision of the colonial governors as vice-admirals.[85]

By all accounts, the provincial courts enjoyed an instance practice wider than the mother court.[86] On occasions their excesses were curbed by the local common law courts which assumed an inherent right to issue prohibitions. By comparison with the English experience common law attacks were spasmodic, partly because of the uncertainty whether the 14th century statutes applied in colonies and plantations and partly because the vice-admiralty courts proved to be popular among the local mercantile community.[87] A substantial portion of vice-admiralty business comprised prize cases, a jurisdiction which was legitimized pursuant to a 1707 statute authorizing privateers to share in the proceeds of prize condemned by Admiralty.[88] When hostilities between Britain and France erupted in 1756, provincial courts were commissioned to sit in prize and issue letters of marque and reprisal to merchant vessels.[89] But it was a third facet of jurisdiction—the enforcement of trade and revenue laws—which involved the vice-admiralty courts in the events leading to the American Revolution.

Trade Laws

England's dependence upon her merchant marine for naval and mercantile security had prompted her to experiment with shipping

[80] 22 & 23 Cha. II, c. 11 (1670).
[81] 8 Geo. I, c. 24 (1721).
[82] 1 Anne, st. 2, c. 9 (1702).
[83] 11 & 12 Wm. III, c. 7 (1698) made perpetual by 4 Geo. I, c. 11 (1717).
[84] Robertson, op. cit. Ch. 4.
[85] C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960), Ch. 1.
[86] Ibid. fn. 84, 85.
[87] Ibid.
[88] 6 Anne c. 37 (1707).
[89] Ubbelohde, op. cit. 23; Robertson, op. cit. 299.

monopolies as early as the 14th century.[90] In 1382 English merchants were statutorily required to import and export cargo in English ships exclusively.[91] The preference accruing to shipowners, however, was counterproductive to merchants competing in European markets[92] and the statute was modified one year later[93] but re-applied to exports in 1390.[94] Protectionist measures were temporarily re-asserted in 1463[95] and towards the end of the century restrictions were imposed on alien imports in addition to English exports.[96] Indeed, Florence agreed by treaty in 1490 not to import English wool unless transported in English ships.[97] The early 16th century witnessed the continuation of this commercial policy[98] subject to the King proclaiming dispensations and exemptions[99] which favoured Hanseatic merchants.[100] In 1540, aliens were relieved from customs dues if they engaged available English vessels and Admiralty was empowered to certify the unavailability of English ships.[101]

Early Elizabethan legislation levied duties on all imports and exports unless shipped in English vessels manned by an English crew, subject to prescribed exemptions.[102] Of these statutes, a 1562 Act[103] was repeatedly reinstated well into the 17th century.[104] It abolished customs duties for exports shipped in English vessels and prohibited all coastal trade employing foreign vessels and the importation of wine and timber in foreign vessels, upon pain of forfeiture. The same statute instituted a system of licensing in the fishing trade, fixed freight rates on grain, regulated the production of flax and the measurement of wine and made provision for naval discipline. Provisions were relaxed in the early 17th century[105] until total restraints were re-introduced by proclamation to bolster the depressed shipping industry.[106] Thence followed a long list of trading measures, inspired by lobbying interests,[107] designed to stimulate English shipping and suppress foreign competition.

90 42 Edw. III, c. 8 (1368).
91 5 Rich. II, st. 1, c. 3 (1382).
92 L. A. Harper, *The English Navigation Laws* (N.Y., Columbia University Press, 1939) 19-20.
93 6 Rich. II, st. 1, c. 8 (1383).
94 14 Rich. II, c. 6 (1390).
95 3 Edw. IV, c. 1 (1463).
96 1 Hen. VII, c. 8 (1485); 4 Hen. VII, c. 10 (1488).
97 Harper, op. cit. 22.
98 23 Hen. VIII, c. 7 (1531).
99 7 Hen. VIII, c. 2 (1515); 26 Hen. VIII, c. 10 (1534); 31 Hen. VIII c. 8 (1539).
100 Harper, op. cit. 25.
101 32 Hen. VIII, c. 14 (1540).
102 1 Eliz. I, c. 13 (1558); 5 Eliz. I, c. 5 (1562); 13 Eliz. I, c. 15 (1571).
103 5 Eliz. I, c. 5 (1562).
104 27 Eliz. I, c. 11 (1584); 28 & 29 Eliz. I, c. 5 (1587); 31 Eliz. I, c. 10 (1588); 35 Eliz. I, c. 7 (1592); 39 & 40 Eliz. I, c. 18 (1598); 43 Eliz. I, c. 9 (1601); 1 Jac. I, c. 25 (1603); 21 & 22 Jac. I, c. 28 (1623); 3 Cha. I, c. 4 (1627); 16 Car. I, c. 4 (1640).
105 1 Jac. I, c. 25 (1603); 3 & 4 Jac. I, c. 11 (1607).
106 Harper, op. cit. 36-7.
107 Ibid. Ch. 4.

England, on the verge of war, passed the first of her notorious *Navigation Acts* in 1651 to retard the powerful shipping interests of the Dutch. The Ordinance of 1651 required all commodities to be imported from Europe by English ships or ships of the country of origin and prohibited importation from Asia, Africa and America in foreign ships.[108] Preferential rates for itemized commodities were introduced[109] and taxes adjusted to increase the domestic construction of ships.[110] But of interest here are the renowed statutes known as the *Navigation Laws*.[111] They prohibited, inter alia, the trade of goods with Asia, Africa or America except in English ships, the master and three fourths of the mariners of which were required to be English. Enumerated commodities produced in English plantations could not be shipped to foreign countries and no European goods could be shipped to the colonies unless exported from England in English ships. Trade among the colonies could be conducted only in English vessels, and no colonially manufactured wool could be exported at all.[112] Proceedings to enforce the *Navigation Laws* and forfeit ships and cargo contravening the statutes could be brought in a court of record,[113] which disqualified the Court of Admiralty unless the goods were captured as prize by a commissioned ship.[114] Otherwise proceedings were generally commenced in the Court of Exchequer which was the traditional court of revenue.[115] In the colonies, however, the entire gamut of trade and revenue enforcement was vested in the vice-admiralty courts, concurrently with common law courts.[116]

Colonial Relations

Although English colonies reaped economic advantages from British trade policy,[117] the British trade laws were unpopular among local merchants and shipowners. Prosecutions were launched in vice-admiralty courts to circumvent uncooperative common law juries, but merchants retaliated in common law courts with actions against customs officials for

[108] *Acts and Ordinances of the Interregnum*, op. cit. fn. 52, Vol. II, 559 (1651).
[109] For example, 12 Cha. II, c. 4 (1660); 15 Cha. II, c. 7 (1663); 25 Cha. II, c. 4 (1672); 1 Wm. & M., c. 12 (1688); 9 & 10 Wm. III, c. 23 (1698); 10 & 11 Wm. III, c. 10 (1699); 9 Anne, c. 6 (1710); 8 Geo. I, c. 15 (1721); 10 Geo. I, c. 16 (1723); 11 Geo. I, c. 7 (1724); 12 Geo. I, c. 26 (1725).
[110] 13 & 14 Cha. II, c. 11 (1662); 22 & 23 Cha. II, c. 11 (1670); I Jac. II, c. 18 (1685); 5 & 6 Wm. & M., c. 24 (1694).
[111] 12 Cha. II, c. 18 (1660); 13 & 14 Cha. II, c. 11 (1662); 15 Cha. II, c. 7 (1663); 22 & 23 Cha. II, c. 26 (1670); 25 Cha. II, c. 7 (1672); 7 & 8 Wm. III, c. 22 (1695); 9 Wm. III, c. 42 (1697); and see Holdsworth, op. cit. XI, 84 et seq.; VI, 319 et seq.
[112] 10 Wm. III, c. 16 (1698).
[113] 12 Cha. II, c. 18 (1660); 7 & 8 Wm. & M., c. 22 (1695).
[114] 12 Cha II, c. 18 (1660) as explained by 13 & 14 Cha. II, c. 11 (1662); 7 & 8 Wm. & M., c. 22 (1695).
[115] Harper, op. cit. Ch. 10.
[116] 7 & 8 Wm. & M., c. 22, s. 7 (1695) and 8 Geo. III, c. 22 (1767). See *The Hercules* (1819) 2 Dods. 353, 371; 165 E.R. 1511, 1517.
[117] See Holdsworth, op. cit. VI, 319 et seq.

trespass and false arrest where sympathetic juries awarded substantial damages.[118] Facing a huge deficit at the cessation of the Seven Years' War, Britain made a concerted effort to increase revenue from her colonies. In 1763 and 1764, hovering legislation was extended to the colonies[119] and naval officers were sworn as customs officials with authority to intercept vessels at sea violating trade laws. The mercantile community reacted with allegations of indiscriminate seizures on the part of a profiteering navy.[120] And the measure was equally unpopular in government circles. Land based customs officials resented the intrusion of the navy and the share of proceeds from condemned captures being paid to them; colonial governors objected to the loss of their spoils' revenue to the admirals. Indeed, the *Revenue Act* 1764 (Imp.),[121] even antagonized the vice-admiralty judges by the creation of a Vice-Admiralty Court with jurisdiction over all America, concurrent with the regional courts. Colloquially known as the Black Act, it required owners of seized ships and cargo to bear the onus of challenging the forfeiture and required them to lodge security for the costs of proceedings. If the court certified that there was probable cause for seizure the claimant, though successful, was liable for costs of the proceedings. To discourage civil suits against officials, the Act declared the maximum amount recoverable by an aggrieved claimant to be the paltry sum of two pence with no costs, whereas if judgment were given for the customs officer he was entitled to treble costs. But the most alienating feature of the Act was the imposition of duties on commodities imported into the colonies, no longer designed as a protective trade measure but introduced purely as a tax device.

Dissatisfaction with revenue laws exploded into hostility with the passing of the *Stamp Act* 1765 (Imp.) which levied duty on a broad spectrum of instruments used in the colonies and plantations to defray Britain's national debt.[122] Prosecution for breach of all trade and revenue laws could be brought in an appointed vice-admiralty court[123] whose documentary process itself was subject to stamp duty. Confronted by defiance, trade sanctions and riots, Britain repealed the *Stamp Act* in 1766[124] accompanied by the *American Colonies Act* 1766 (Imp.) affirming Parliament's right to legislate for the colonies.[125]

Nothing had resolved the friction over spoils. The 1764 Act had distinguished between seizures on land and seizures at sea and the respective division of spoils to governor and customs officials in the former case and

[118] Ubbelohde, op. cit. 34.
[119] 3 Geo. III, c.25 (1763); 4 Geo. III, c. 15 (1764).
[120] Ubbelohde, op. cit. 57.
[121] 4 Geo. III, c. 15 (1764).
[122] 5 Geo. III, c. 12 (1765).
[123] 5 Geo. III, c. 12 (1765) and 8 Geo. III, c. 22 (1768).
[124] 6 Geo. III, c. 11 (1766).
[125] 6 Geo. III, c. 12 (1766).

naval personnel and admirals in the latter.[126] Legislation in 1765 further refined the distinction only to confer upon the sea forces the rights to spoils taken on rivers.[127] But the discontent of public officials was forgotten in the turmoil of the following years. The new fiscal policy relaxed duty on goods imported into England[128] but increased duty on itemized goods imported into America.[129] Further opposition persuaded the motherland to suspend duties in 1770, except that on tea,[130] over which a statutory monopoly was granted in 1773.[131] The ensuing events are enshrined as one of the most spirited chapters in history. Tea dumping and boycotts in Boston were matched with draconian legislation from Britain,[132] the revocation of the Massachusetts charter and military occupation. In 1774, colonists assembled in Congress and in 1776 promulgated the Declaration of Independence. At the conclusion of the American War of Independence in 1783, the Treaty of Versailles acknowledged thirteen United States of America in whose creation the Admiralty jurisdiction had played a part.

Of immediate concern to the liberated States was the creation of prize courts established to condemn captures.[133] In addition, maritime courts were set up to exercise an admiralty jurisdiction predating James I.[134] These courts were thus exposed to the restrictions of 14th century legislation and to the use of prohibitions by State common law courts. Yet perhaps the most interesting feature was the introduction of jury trial into State maritime law courts. Throughout the colonial era, resistance to the trade and revenue activity of the vice-admiralty courts was mounted on the ideological argument that no man should be tried except by a jury of his peers, as in England.[135] Yet within four years of its inception in maritime causes, the States decided jury trial was incompatible with Admiralty law and it did not survive the Constitution.[136]

Reformation

The unsatisfactory performance of State admiralty courts during

126 5 Geo. III, c. 12 (1765).
127 5 Geo. III, c. 45 (1765).
128 See 7 Geo. III, cc. 4, 5, 8 (1766); 8 Geo. III, cc. 1, 2, 3, 9 (1768).
129 7 Geo. III, c. 46 (1766).
130 12 Geo. III, c. 60 (1772).
131 13 Geo. III, c. 44 (1773).
132 See 14 Geo. III, c. 19 (1774); 15 Geo. III, cc. 10, 18 (1775); 16 Geo. III, cc. 5, 11 (1776); 17 Geo. III, cc. 7, 9, 40 (1777); 20 Geo. III, c. 46 (1780).
133 Robertson, op. cit. Ch. 5.
134 Ibid. 97. The Act of the Virginia legislature is particularly instructive: "The court shall have cognizance of all cases heretofore of admiralty jurisdiction in this country, and shall be governed in their proceedings and decisions by the regulations of the Continental Congress, Acts of Annual Assembly, English statutes prior to the fourth year of the reign of King James the First, and the laws of Oleron, the Rhodian and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty."
135 Ubbelohde, 145-6.
136 Ibid. 195-201.

Confederation induced the Convention of 1787 to place admiralty activities under Federal supervision. Accordingly, the Constitution of the United States extended Federal judicial power to "all cases of admiralty and maritime jurisdiction".[137] Uncertainty about the reasons for and meaning of the conjunctive phraseology[138] did not prevent it being used in the Australian Constitution when like jurisdiction was made available to the High Court.[139] Congress implemented the power when the *Judiciary Act* 1789 (U.S.) bestowed exclusive original jurisdiction on Federal District Courts "saving to suitors . . . the right of a common law remedy where the common law is competent to give it".[140] In 1948 and 1949 the wording of the celebrated saving clause was amended and the provision now reads:[141]

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ."

The change in terminology does not appear to have restricted the concurrent jurisdiction of common law introduced by the original saving clause which enabled proceedings *in personam* to be brought in State common law courts. However, suits *in rem* are exclusive to the Federal courts notwithstanding State legislation to the contrary.[142] Suits *in personam* could be brought in the common law side of Federal District Courts if they otherwise qualified. Since the 1966 Federal Rules of Civil Procedure unified proceedings,[143] admiralty suits in District Courts proceed as common law actions.

Even before Britain began to rebuild her Admiralty system by statute, the United States judiciary had laid the foundation to hers. The cornerstone was set in place by Justice Story in *De Lovio* v. *Boit*[144] when he rejected the stifling English limitations on subject matter[145] in favour of a jurisdiction governing all torts, injuries and contracts relating to the navigation, business or commerce of the sea. Federal jurisdiction in admiralty is not circumscribed by the geographic locality of waters *per se* but it is limited to waters navigable by ships engaged in interstate or overseas commerce.[146]

137 Art. III, s. 2.
138 Robertson, op. cit. Ch. 1.
139 S. 76(iii).
140 1 Stat. 76, 77.
141 28 U.S.C.A. 1333.
142 *The Moses Taylor* 71 U.S. 411 (1867); *Hine* v. *Trevor* 71 U.S. 555 (1867); cf. *Hendry Co.* v. *Moore* 318 U.S. 133 (1943); *Madruga* v. *California* 346 U.S. 556 (1954).
143 Rule 9(h).
144 7 Fed. Cas. 418, 443 (1815) and see *The New England Marine Insurance Co.* v. *Dunham* 78 U.S. 1 (1870).
145 See *Waring* v. *Clarke* 46 U.S. 441 (1847).
146 See G. Gilmore and C. L. Black, *The Law of Admiralty* (2nd ed., N.Y., Foundation Press, 1975) Ch. 1.

BRITISH FOUNDATION

Resplendent in their scarlet robes and black bonnets, the Doctors of Civil Law had monopolized the practice of Admiralty since the 15th century when they formed an inn of court under the patronage of Trinity Hall, Cambridge.[147] Variously known as the College of Civilians, College of Advocates and Doctors' Commons, their organization was incorporated by Royal Charter in 1768 under the name "College of Doctors of Law exercant in the Ecclesiastical and Admiralty Courts". Their history is as important as it is fascinating, for they supplied the life blood of Admiralty law. From their ranks Judges were appointed to the Admiralty bench and advocates deputized from time to time as Judges surrogate. Stringent educational qualifications maintained a high standard of learning in Civil Law amidst common law saturation. But the 19th century was an era of curial reorganization, an era which saw common lawyers admitted to practice in Admiralty and the College of Doctors dissolved in 1859.[148]

Criminal Structure

For three hundred years felonies committed beyond the common law realm had been tried by commissioners nominally exercising Admiralty jurisdiction under the system inaugurated by the statute of 1536.[149] A number of statutes had preserved and restated the system and extended it to the colonies.[150] But in the climate of unification, jurisdiction over maritime offences was transferred to the common law system. Legislation assimilated maritime crimes with crimes committed in the body of the counties and confirmed their trial by colonial courts.[151] In 1834, the Central Criminal Court was established in London empowered to try offences committed on the high seas and in other places within the jurisdiction of the Admiral.[152] In 1844, the jurisdiction was conferred on all justices of oyer and terminer and general gaol delivery.[153] In the 1861 statutory consolidation of criminal law, indictable offences committed within the jurisdiction of the Admiral were deemed to be of the same nature as if committed on land.[154] Despite reorganization of the curial

147 See generally, Wiswall, op. cit. Ch. 3.
148 Ibid.; 22 & 23 Vic., c. 6 (1859).
149 28 Hen. VIII, c. 15 (1536) cited as the *Offences at Sea Act* 1536 by the *Short Titles Act* 1896.
150 See 22 & 23 Cha. II, c. 12 (1670); 11 & 12 Wm. III, c. 7 (1698) revived by 5 Ann, c. 34 (1706), 1 Geo. I, c. 25 (1714) and made permanent by 6 Geo. I, c. 19 (1719); the *Piracy Acts*, 4 Geo. I, c. 11 (1717), 8 Geo. I, c. 24 (1721), 18 Geo. II, c. 30 (1744); the *Felony and Piracy Act* 12 Geo. III, c. 20 (1772).
151 *Offences at Sea Acts* 39 Geo. III, c. 37 (1799), 46 Geo. III, c. 54 (1806), 1 Geo. IV, c. 90 (1820); 7 Geo. IV, c. 38 (1826); 7 & 8 Geo. IV, c. 28 (1827). And see 59 Geo. III, c. 27 (1819); 1 & 2 Geo. IV, c. 76 (1821); 2 & 3 Wm. IV, c. 40 (1832); 13 & 14 Vic., c. 26 (1850).
152 *Central Criminal Court Act* 1834, 4 & 5 Wm. IV, c. 36.
153 *Admiralty Offences Act* 1844, 7 & 8 Vic., c. 2.
154 *Larceny Act* 1861, *Malicious Damage Act* 1861, *Forgery Act* 1861, *Coinage Offences Act* 1861, *Offences Against the Person Act* 1861, 24 & 25 Vic., cc. 96, 97, 98, 99, 100.

structure, the historical division of jurisdiction was preserved,[155] necessitating the passage of the *Territorial Waters Jurisdiction Act* 1878 (U.K.) to expand Admiralty jurisdiction over offences committed by foreigners in territorial waters. Subject to that and the *jus gentium* concept of piracy,[156] offences committed on board ship were confined to British vessels.[157] Thereafter statutory offences were created as part of the orthodox system of criminal justice and the High Court of Admiralty ceased to be an object of study as a source of criminal law in its own right. The Central Criminal Court was made part of the High Court of Justice in 1873[158] and in 1971 was constituted as the Crown Court.[159]

Prize Structure

Unlike the criminal jurisdiction, prize was retained within the formal structure of the Court but it sat as a Prize Court exercising jurisdiction under special commissions, until the *Naval Prize Act* 1864 (U.K.) made the High Court of Admiralty a permanent court of prize. Even so, legislation controlling prize is usually passed at the outbreak of war. The 19th century revival of interest in the High Court of Admiralty was principally due to the increased business in prize as a result of the Napoleonic Wars and due to the significant contribution to the jurisprudence of prize made by its Judge, Lord Stowell, the older brother of Lord Eldon.[160] So comprehensive is the law of prize that it is treated as a specialized study of law associated with the law of war[161] and as such it ceases to be relevant to the jurisdictional development of the instance jurisdiction of the Court. Privateering was abolished with letters of marque and reprisal by the Convention of Paris in 1856 and the Hague Convention in 1907 when international rules were adopted to regulate the capture of prize.

Civil Reformation

Civil spoils had long since ceased to be a source of personal revenue to the Admiral but the Court was to continue its development of the modern law of salvage in a judicial capacity under its instance jurisdiction. A 1712 statute legislated for a salvage reward to be paid to rescuers and in the event of goods not being claimed within twelve months they were to be sold and the surplus paid into exchequer.[162] The Act was made perpetual in

[155] *R.* v. *Keyn* (1876) 2 Ex.D. 63.
[156] See *R.* v. *Morphes* (1696) 1 Salk. 85; 91 E.R. 80; *A.G. for Hong Kong* v. *Kwok-a-Sing* (1873) L.R. 5 P.C. 179; *Re Piracy Jure Gentium* [1934] A.C. 586.
[157] 28 Hen. VIII, c. 15 (1536); *R.* v. *Allen* (1837) 1 Mood. 494; 168 E.R. 1357; *R.* v. *Serva* (1845) 1 Den. 104; 169 E.R. 169; *R.* v. *Anderson* (1868) L.R. 1 C.C.R. 16; *R.* v. *Carr & Wilson* (1882) 10 Q.B.D. 76.
[158] *Supreme Court of Judicature Act* 1873; *Supreme Court of Judicature (Consolidation) Act* 1925.
[159] *Courts Act* 1971.
[160] See Wiswall, op. cit. Ch. 1.
[161] See C. J. Colombos, *A Treatise on the Law of Prize* (London, Sweet & Maxwell, 1926).
[162] 12 Ann st. 2, c. 18 (1712).

1717[163] and in 1808 legislation required reports of wreck to be submitted to the Deputy Vice-Admiral and unclaimed goods to be sold under the directions of the High Court of Admiralty.[164] Competing jurisdictional claims to wreck had not disappeared with the centuries, for, in 1813, legislation declared salvage jurisdiction between high and low water marks to be within the competence of all courts of record concurrently with the High Court of Admiralty.[165] In 1846 legislation consolidated the law of wreck, salvage and associated activities and the office of Receiver General of Droits of Admiralty was created.[166] Notice of wreck was required to be given to the encumbent from whom the owner could claim restoration within one year. Adverse decisions[167] prompted the Act to authorize the payment of a reward for life salvage but it was not clear whether the life salvage had to be accompanied by property salvage[168] until the Act was replaced in 1854.[169] The 1846 Act, however, set the pattern for a bureaucratized system to administer wrecks and the sale of unclaimed goods adapted by the *Merchant Shippings Acts* 1854-1894 (U.K.).[170]

The first half of the 19th century experienced a number of administrative and jurisdictional reforms to the High Court of Admiralty necessitated by the growth of instance business. Common lawyers were still suspicious of the Civil Law and its disregard of jury trial, but constitutional government had outgrown court rivalry and, accordingly, legislation attempted to devise an Admiralty framework compatible with, but still independent of, the common law structure of courts. Spasmodic legislation conferred piecemeal jurisdiction on Admiralty[171] and statutes in 1810 and 1813 were passed to regulate the office of Registrar.[172] But the major reforms first occurred in 1840 at the urging of the Judge in Admiralty, Dr Stephen Lushington. One Act provided for salaries to be paid to the Judge, Registrar and Marshal.[173] The other, the *Admiralty Court Act* 1840 (U.K.),[174] was significant in that it partially broke down the territorial barrier which had prevailed for five hundred years. The Act conferred jurisdiction on the Court over claims involving ships' mortgages, salvage, wages and necessaries, though arising within the body of counties. However, the jurisdiction was concurrent and did not extend

163 4 Geo. I, c. 12 (1717).
164 48 Geo. III, c. 122 (1808).
165 53 Geo. III, c. 87 (1813).
166 9 & 10 Vic., c. 97 (1846).
167 *The Aid* (1822) 1 Hagg. 83; 166 E.R. 30; *The Zephyrus* (1842) 1 W. Rob. 329; 166 E.R. 596.
168 *Silver Bullion* (1854) 2 Sp. Ecc. & Ad. 70; 164 E.R. 312; *The Fusilier* (1865) Br. & L. 341; 167 E.R. 391.
169 *Merchant Shipping Act* 1854, 17 & 18 Vic., c. 104.
170 See now *Merchant Shipping Act* 1894, Part IX.
171 59 Geo. III, c. 58 (1819); 5 Geo. IV, c. 113 (1824); 6 Geo. IV, c. 110 (1825).
172 50 Geo. III, c. 118 (1810); 53 Geo. III, c. 151 (1813).
173 3 & 4 Vic., c. 66 (1840).
174 3 & 4 Vic., c. 65 (1840).

to other maritime contracts, freights and charterparties.[175] The Act first authorized the issue of rules of court and contained the curious power for issues of fact to be tried by jury.

Salvage jurisdiction was readjusted by legislation in 1846[176] and 1854[177] and additional jurisdiction conferred by isolated legislation[178] including the power to condemn pirates' goods.[179] Following the Registrar's defalcation of Court fees,[180] the *Admiralty Court Act* 1854 (U.K.) was passed to substitute stamps for fees.[181] The Act instituted a number of procedural provisions including the use of monition as an alternative to a warrant for the arrest of ships and cargoes. In 1855 and 1859, rules of court were promulgated installing procedures used today[182] and in 1859 common lawyers were admitted to practice in the Court.[183]

To cater for the increasing popularity of the Court, Dr Lushington recommended the further enlargement of jurisdiction and due recognition of its status. The *Admiralty Court Act* 1861 (U.K.) declared the High Court of Admiralty to be a court of record with powers of a superior common law court.[184] The Court acquired jurisdiction over bills of lading, damage to cargo and claims for necessaries unless the shipowner was domiciled in England and Wales. No such limitation was placed on claims for damage done by ship which,[185] expressed in such generalized terms, admitted a variety of collision claims including those occurring within the body of a county.[186] However, the Act did not entirely free the Court from historical limitations[187] nor did it avail the Court of jurisdiction over general average and freight.[188] But it did provide that jurisdiction could be exercised by proceedings *in rem* or *in personam.*

Instance Amalgamation

The second period of the 19th century set about dismantling the divided curial structures and unifying the administration of justice. In 1868 limited Admiralty jurisdiction was granted to County Courts.[189] In 1869 the First Report of the Judicature Commission recommended the amalgamation of Admiralty and common law courts to eliminate non-suits

175 *The Fortitude* (1843) 2 W. Rob. 217; 166 E.R. 736.
176 9 & 10 Vic., c. 97 (1846).
177 *Merchant Shipping Act* 1854.
178 *Harbours Docks and Piers Clauses Act* 1847; *Piracy Act* 1850.
179 *The Magellan Pirates* (1853) 1 Sp. Ecc. & Ad. 81; 164 E.R. 47.
180 Wiswall, op. cit. 83.
181 17 & 18 Vic., c. 78 (1854).
182 *The Judith M* [1968] 2 Lloyd's Rep. 474.
183 22 & 23 Vic., c. 6 (1859).
184 24 & 25 Vic., c. 10 (1861).
185 See *The Clara Kellam* (1870) L.R. 3 A. & E. 161; *The Tolten* [1946] P. 135.
186 *The Malvina* (1862) 6 L.T.R. 369.
187 See *General Iron Screw Collier Co.* v. *Schurmanns* (1860) 1 J. & H. 180; *The Johannes* (1860) Lush. 182.
188 *The Constancia* (1846) 2 W. Rob. 487; 166 E.R. 839; *Place* v. *Potts* (1855) 5 H.L.C. 383.
189 31 & 32 Vic., c. 71 (1868); 32 & 33 Vic., c. 51 (1869).

and to take advantage of the more attractive remedies of Admiralty. The recommendations were enacted in the *Supreme Court of Judicature Act* 1873 (U.K.) which united the High Court of Admiralty with other civil and common law courts into a Supreme Court of Judicature comprising the appellate Court of Appeal and the original High Court of Justice. The latter was subdivided into five divisions of which the Probate, Divorce and Admiralty Division formed one, inheriting the exclusive jurisdiction of the High Court of Admiralty.[190] The Act preserved the rules of procedure of the old Court subject to revision and retained the half-damages rule for both-to-blame collisions.[191]

Before the 1873 Act came into operation the *Supreme Court of Judicature (Commencement) Act* 1874 (U.K.) suspended it until amendments were made by the *Supreme Court of Judicature (Amendment) Act* 1875 (U.K.) which considerably altered the rules of procedure. The Act also contained provision for the Judge in Admiralty, then Sir Robert Phillimore, to resign from office and take up his appointment as Justice of the High Court.[192] Apart from the considerable administrative controls instituted by the *Merchant Shipping Act* 1894 (U.K.) maritime jurisdiction was not affected by legislative amendments until they were consolidated by the *Supreme Court of Judicature (Consolidation) Act* 1925 (U.K.) which reduced the Divisions of the High Court to three.[193] This state continued through amendments supplementing jurisdiction until the present position was attained by the *Administration of Justice Act* 1970 (U.K.). That Act abolished the Probate, Divorce and Admiralty Division and established an Admiralty Court within the Queen's Bench Division of the High Court to which the Admiralty jurisdiction was transferred.[194]

The jurisdiction of the new Admiralty Court underwent substantial revision in the *Administration of Justice Act* 1956 which rationalized many historical anomalies and created a statutory jurisdiction over claims as wide ranging as damage done or received by a ship, personal injury, cargo loss or damage, charter parties, salvage, towage, pilotage and general average in addition to the jurisdiction inherited from its predecessors.

AUSTRALIAN FOUNDATION

Development

The King in Council issued letters patent dated 12th April 1787 authorizing the Lords Commissioners of the Admiralty to constitute and appoint "a Vice Admiral and also a Judge and other officers requisite for

190 36 & 37 Vic., c. 66 (1873), ss. 34(4), 42.
191 Ibid. ss. 70, 25(9).
192 38 & 39 Vic., c. 77 (1875) s. 8.
193 Ss. 22, 33, 56.
194 S. 2. As to the Crown's right to wild animals, see *Wild Creatures and Forest Laws Act* 1971 (U.K.).

a Court of Vice Admiralty within the said Territory called New South Wales".[195] Under seal of the High Court of Admiralty, letters patent dated 30th April appointed Arthur Phillip to be Vice Admiral and Robert Ross to be Commissary in the Vice Admiralty Court.[196] The court was empowered to take cognizance of civil and criminal issues in the maritime jurisdiction of the colony "according to the civil and maritime laws and customs of our High Court of Admiralty in England". Similar commissions appointed a succession of Vice Admirals and Judges.[197] A second tribunal, designated as a Court of Admiralty, was established by letters patent dated 5th May 1787 appointing commissioners pursuant to the Piracy statutes[198] to try offences committed within the Admiral's jurisdiction "according to the civil law and the methods and rules of the Admiralty".[199] In contrast with the instance court, the criminal body could be assembled with colonial officials and ships' captains sitting as commissioners *ex officio.*

Notwithstanding the different composition of these courts—the instance court constituted by a judge and the criminal court by not less than seven commissioners—no clear distinction between the two entities was observed in the formative years of the colony. When, in 1798, the criminal tribunal first convened to try a prisoner for mutiny, the proceedings were recorded as a sitting of the Vice Admiralty Court.[200] Numerous references suggest that the tribunals were regarded as benches of the one Court,[201] yet it is surprising that in 1799 when the Court sat to hear the first of several prize cases, it assembled with the constituents of the criminal tribunal.[202] In 1810 Ellis Bent, newly arrived in the colony as Judge in Vice Admiralty, complained that no court had authority to sit in prize, whereupon an enabling commission issued in 1812 only to be revoked in 1813.[203] It seems unlikely that the criminal court had jurisdiction to try prosecutions against trade and revenue laws, although it appears to have done so in 1807.[204] The Judge in Vice Admiralty was commissioned to do so[205] but his authority should have derived from the statutory appointment of Vice Admiralty Courts in British colonies to try offences and condemn seizures under imperial[206] and colonial[207] legislation. The sheer volume of trade and

195 For this and generally see J. M. Bennett, *A History of the Supreme Court of New South Wales* (Sydney, Law Book Co., 1974) Ch. 10.
196 Ibid. 232-40.
197 For the problem arising when the *persona designata* were absent see, ibid. 159.
198 11 & 12 Wm. III, c. 7 (1698); 5 Anne, c. 34 (1706); 1 Geo. I, c. 25 (1714); 6 Geo. I, c. 19 (1719); 8 Geo. I, c. 24 (1721).
199 H.R.A. Ser. IV, Vol. I, 13. See J. M. Bennett, *The Vice-Admiralty Court of New South Wales* (1970) Ch. 2.
200 Ibid. 20.
201 H.R.A. Ser. I, Vol. II, 356; Bennett, *Supreme Court* op. cit. 159.
202 Bennett, *Vice-Admiralty* op. cit. 22 et seq.
203 Ibid. 40 et seq.
204 Ibid. 28.
205 Bennett, *Supreme Court* op. cit. 157.
206 See 6 Geo. IV, c. 49 (1825); Bennett, *Vice-Admiralty* op. cit. 58, 64.
207 Bennett, *Vice-Admiralty* op. cit. 47; *Prince* v. *Duncan* (1871) 10 S.C.R. (N.S.W.) 253.

revenue legislation is revealed by the repealing statute of 1825[208] when British customs laws were consolidated.[209] In any event, Australian colonies were spared the experiences of their American cousins.

The Vice Admiralty Court was unaffected by the creation of three civil courts in New South Wales in 1814.[210] Nor were its several jurisdictions withdrawn in 1823[211] and 1828[212] when the Supreme Court was endowed with a criminal jurisdiction over maritime offences.[213] Yet the criminal function of Vice Admiralty thereupon fell into disuse and with it, the unwieldy tribunal of commissioners. As a civil court of instance, the Vice Admiralty Court continued to operate quite actively.[214] The Chief Justice was commissioned as Judge in Vice Admiralty in New South Wales[215] and a Judge was appointed to sit with like jurisdiction in Van Diemen's Land.[216] In 1844, proceedings over a specialty contract were restrained by common law prohibition for want of jurisdiction in Admiralty.[217] In 1848 local legislation attempted to deter frivolous and vexatious proceedings to arrest ships which evidently had been used to procure as advantage over the shipowner who was scheduled to clear port.[218] The legislation itself suggests that practitioners were conscious of the prohibition device, for it imposed liability for costs of prohibition proceedings on the arresting party.

That Britain was not intending to abandon her Admiralty outposts became clear when she devoted legislation to the colonial courts. In 1832 an Act was passed to confirm the jurisdiction of Vice Admiralty Courts in British possessions to entertain civil suits and to provide for the promulgation of regulations.[219] This statute was repealed by the *Vice Admiralty Courts Act* 1863 (Imp.) as amended in 1867, which appointed the Governor of a British possession to be *ex officio* Vice Admiral and the Chief Justice *ex officio* Judge of the Vice Admiralty Court, in the absence of formal appointments.[220] The Act enumerated the civil claims over which Courts had jurisdiction and preserved their operation under trade and revenue laws. The Act was expressed to apply to the Vice Admiralty

208 6 Geo. IV, c. 105 (1825).
209 See 6 Geo. V, cc. 104-15 (1825), 7 & 8 Geo. IV, c. 53 (1827).
210 Second Charter of Justice, H.R.A. Ser. IV, Vol. I, 77.
211 4 Geo. IV, c. 96 (1823); Third Charter of Justice, H.R.A. Ser. IV, Vol. I, 509; continued by 7 & 8 Geo. IV, c. 73 (1827).
212 9 Geo. IV, c. 83 (1828) continued by 6 & 7 Wm. IV, c. 46 (1836); 1 Vic., c. 42 (1838); 1 & 2 Vic., c. 50 (1838); 2 & 3 Vic., c. 70 (1839); 3 & 4 Vic., c. 62 (1840).
213 Infra *Criminal Structure* p. 112.
214 For case summaries, see Bennett, *Vice-Admiralty*, op. cit. 74.
215 H.R.A. Ser. I, Vol. XII, 143.
216 Ibid. Ser. III, Vol. IV, 598. Letters patent in 1857 confirmed jurisdiction in Victoria, Bennett, *Vice-Admiralty*, op. cit. 86.
217 Ibid. 76.
218 11 Vic., No. 46 (1848) (N.S.W.); Bennett, *Supreme Court*, op. cit. 162.
219 2 Wm. IV, c. 51 (1832); Order in Council dated 27 June 1832.
220 26 Vic., c. 24 (1863). Letters patent in 1841 had appointed the Chief Justice of New South Wales *ex officio*, H.R.A. Ser. I, Vol. xxi, 307.

Courts presently existing in each of the Australian colonies.[221] Regrettably, the history of those courts in colonies other than New South Wales had yet to be written.

Following the *Judicature Acts* 1873 and 1875 reorganization, an imperial Bill was circulated among the colonies proposing the dissolution of the imperial system of courts and replacing them with a system more compatible with indigenous judicial frameworks.[222] The Bill was approved by all colonies except New South Wales and Victoria in which two colonies it was suspended from operation when it came into force as the *Colonial Courts of Admiralty Act* 1890 (Imp.).[223]

Criminal Structure

Re-enacting the 1823 provisions, the *Australian Courts Act* 1828 (Imp.) conferred criminal jurisdiction over maritime offences on the Supreme Courts of New South Wales and Tasmania. Section 4 empowers the two courts to try offences committed upon the sea or in any place where the Admiral has jurisdiction by a crew member of a British ship or by a British subject. It should be observed in passing that the statutory jurisdiction falls short of the inherent jurisdiction of Admiralty which also embraced offences committed on board British ships by foreigners. This statutory authority may also be exercised by the Supreme Courts of the Australian Capital Territory, which derived its jurisdiction from New South Wales, and external Territories which adopted the jurisdiction of the Australian Capital Territory. No other Supreme Court was invested with the corresponding curial jurisdiction when established by local legislation. Provision was made for Victoria to adopt the statutory jurisdiction but the power was never exercised.[224] At the time when other Supreme Courts were created, the exercise of the criminal jurisdiction of Admiralty had been transferred to the common law system in England. Before the High Court of Australia in *The Queen* v. *Bull*[225] (about which more will be said shortly) it was submitted that when the Australian courts were granted the common law jurisdiction of England, they derived the criminal jurisdiction of Admiralty through the common law source. The submission was accepted by one member of the High Court[226] but rejected by three.[227]

Imperial legislation, however, did confer a maritime jurisdiction on colonial criminal courts generally, in addition to that bestowed on the selected Supreme Courts. The *Admiralty Offences (Colonial) Act* 1849

221 See *Rajah of Cochin* (1859) Swab. 473; *Lapraick* v. *Burrows* (1859) 13 Moo. P.C. 132; 15 E.R. 50.
222 Bennett, *Supreme Court*, op. cit. 163-4.
223 53 & 54 Vic., c. 27 (1890).
224 13 & 14 Vic., c. 59, s. 28 (1850).
225 (1974) 131 C.L.R. 203.
226 Ibid. 242, per McTiernan J.
227 Ibid. 228, per Barwick C.J.; 269, per Stephen J.; 280, per Mason J.

(Imp.) invested each court of criminal justice with jurisdiction to try offences committed on the sea or in any place where the Admiral has jurisdiction, as if committed within the local limits of the colonial court's jurisdiction. Acting as colonial outposts of Admiralty, local courts could therefore try prosecutions for English offences committed by British subjects or committed aboard British ships.[228] Furthermore, the jurisdiction of the Admiral was expanded by the *Territorial Waters Jurisdiction Act* 1878 (U.K.)[229] to embrace indictable offences committed by foreigners in imperial territorial waters bordering the colonies.[230] State courts exercising jurisdiction which is identified by the Admiral's jurisdiction under the 1849 legislation, therefore, have cognizance of foreigners in territorial waters. And although the Supreme Courts operating under the 1828 Act are limited by that Act to offences committed by British subjects or crew from British ships, the *Territorial Waters Jurisdiction Act* 1878 appears to invest them, also, with authority over foreigners in territorial waters. The *Merchant Shipping Act* 1894, s. 686, also confers jurisdiction on colonial courts to try offences committed by a British subject or a foreign subject on a British ship as if the offences were committed within the limits of the ordinary jurisdiction.

Whereas the 1849 Act stipulated for the imposition of English penalties for colonial convictions, the *Courts (Colonial) Jurisdiction Act* 1874 (Imp.) substituted colonial penalties to be applied to colonial convictions.[231] In respect of trials conducted by virtue of any imperial Act then or thereafter passed, the Act requires sentences to be imposed as if the crimes had been committed within the local jurisdiction of the court. If the imperial crime is not punishable by the law of the colony, the penalty is that which most nearly corresponds with the punishment, other than capital punishment, which would be inflicted in England.

An illustration of a colonial trial under imperial law is provided by *Oteri* v. *The Queen*.[232] The accused were indicted before a District Court in Western Australia with an offence under the *Theft Act* 1968 (U.K.) for having stolen crayfish pots some twenty two miles off the coast. Upon a demurrer, the District Court reserved the question of its jurisdiction for the Court of Criminal Appeal from which judgment the accused appealed to the Judicial Committee. The Judicial Committee dismissed the appeal and confirmed the judgment below that the *Admiralty Offences (Colonial) Act* 1849 and the *Merchant Shipping Act* 1894, s. 686, invested the District Court with jurisdiction to try an imperial offence. The indictment itself alleged the offence to be within the jurisdiction of the Admiralty of

[228] Supra fn. 157.
[229] Introduced to overcome *R.* v. *Keyn* (1876) L.R. 2 Ex. D. 63.
[230] See *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177; *New South Wales* v. *The Commonwealth* (1976) 50 A.L.J.R. 218.
[231] See *R.* v. *Mount* (1875) L.R. 6 P.C. 283.
[232] (1977) 51 A.L.J.R. 122.

England which, together with s. 686 of the *Merchant Shipping Act* 1894, necessitated proof of a British nexus. The accused were British subjects, though Australian residents, and the ship was British by virtue of its ownership.

What of the requirement contained in the imperial legislation that the colonial court proceed on the assumption that the crime was committed within its jurisdiction? This very question had been raised in the Supreme Court of Western Australia when in *The Queen* v. *Robinson*[233] the defendant was charged with committing an offence under the *Explosive Substances Act* 1883 (U.K.) when he discharged an explosive some fifty miles off the coast of Western Australia. The offence was committed aboard a British ship and the Crown alleged that the 1849 Act conferred Admiralty jurisdiction on the State court. The accused contended that the 1849 Act did not apply unless the act complained of would also constitute an offence according to State law, if committed on State waters. The defence was rejected.

The statutory assumption is a fiction which enables the local court to assume jurisdiction but which does not bear upon the law to be applied. It is a very clumsy fiction if the law under which the prosecution proceeds should happen to exclude crimes on inland waters. On the one hand, the colonial court must pretend that the facts occurred on inland waters to provide a geographical nexus of jurisdiction and, on the other, must apply imperial law directed to offences committed on the high seas. Furthermore, in the sentencing process, the court is then asked to discard the imperial law and apply a penalty appropriate to colonial law. This assumes that the facts would have given rise to a local crime, presumably disregarding the fact that they occurred on the high seas. For example, in *William Holyman & Sons Pty Ltd* v. *Eyles*,[234] the defendant appealed to the Supreme Court of Tasmania from his conviction in a Court of Petty Sessions for an offence under the *Protection of Animals Act* 1911 (U.K.). The appellant was found guilty of cruelty to horses when transporting them by ship from Melbourne to Launceston. Exercising jurisdiction under the 1849 imperial Act, the Court relied upon the comparable provisions of the local *Cruelty to Animals Prevention Act* 1925 (Tas.) to arrive as its sentence.

The question remains whether the series of imperial legislation invests in Australian courts jurisdiction to try Australian crimes committed on the high seas as it does imperial crimes. In *The Queen* v. *Bull*,[235] the accused were indicted before the Supreme Court of the Northern Territory with having committed offences under the *Customs Act* 1901 (Cth). The alleged offences were committed when the accuseds' vessel importing cannabis was intercepted off the coast. Among the issues stated for the

[233] [1976] W.A.R. 155.
[234] [1947] Tas. S.R. 11.
[235] (1974) 131 C.L.R. 203.

High Court was the question whether the Supreme Court had jurisdiction to try the charges. The Supreme Court of the Northern Territory inherited the territorial jurisdiction of the Supreme Court of South Australia as at 1911.[236] At that date the *Judiciary Act* 1903 (Cth) had invested State courts with federal jurisdiction within the limits of their several jurisdictions. To the submission that the Court's jurisdiction over colonial offences was intrinsically restricted to the boundaries of the coastline, Menzies and Gibbs JJ. took the view that the 1874 Act removed all territorial limitations in respect of colonial offences. Barwick C.J., Stephen and Mason JJ. disagreed, holding that the 1874 Act simply re-ordered the penalties for imperial offences and did not purport to establish a maritime jurisdiction in colonial offences. Nevertheless, Stephen and Mason JJ. were prepared to find that the federal legislation supplied the extra-territorial authority. McTiernan J. favoured a third approach (with which Barwick C.J., Stephen and Mason JJ. expressly disagreed) namely, that the common law jurisdiction of the Supreme Court inherited the unrestricted English Admiralty jurisdiction which had been transferred to the English common law courts. The end result was that all justices, save Barwick C.J., agreed that the Supreme Court of the Northern Territory had jurisdiction to try the Australian maritime offence. One other observation from this case is of interest. Menzies and Gibbs JJ. were of the opinion that the 1849 Act is not confined to British ships or subjects, whereas Barwick C.J. thought that it is so limited to coincide with the Admiral's jurisdiction beyond territorial waters.

The imperial legislation conferring jurisdiction applies to both the States and the Commonwealth as British possessions. The States cannot pass legislation repugnant to the imperial legislation although the Commonwealth is at liberty to do so. Of course, there need be nothing inconsistent in State legislation conferring jurisdiction on local courts hearing offences committed at sea under local legislation but both jurisdictional and substantive legislation must survive the test for a nexus with the peace, order and good government of the State. Moreover, the Constitution[237] entitled the federal legislature to make laws conferring original jurisdiction on the High Court in respect of admiralty and maritime jurisdiction which by virtue of the *Judiciary Act* 1903 (Cth) invests State courts with that federal jurisdiction. The *Navigation Act* 1912 (Cth) contains provisions corresponding with the *Merchant Shipping Act* 1894 (Imp.) which, inter alia, confer jurisdiction on Australian courts to try Australian citizens or aliens on Australian ships for crimes committed on the high seas.[238] Whether particular legislation applies to conduct outside the maritime perimeter depends upon the interpretation of that legislation. Fisheries

[236] *Northern Territory Supreme Court Act* 1961 (Cth).
[237] S. 76(iii).
[238] Part X.

legislation, for example, expressly regulate offences at sea.[239] The *Crimes Act* 1914 (Cth), s. 3A, extends the Act throughout and beyond the Commonwealth and Territories. Some States have generally projected their laws beyond the coastline subject to extra-territorial connexions.[240] More recently, the Commonwealth enacted the *Crimes at Sea Act* 1979 (Cth) to apply the criminal laws of a State or Territory to offshore areas, to Australian ships connected with that State or Territory and to foreign ships outside territorial waters en route to Australia. It is intended that States complement the federal legislation with state legislation extending their criminal laws to ships or intra-state voyages and to events within State territorial waters. Victoria has passed the *Crimes (Offences at Sea) Act* 1978 (Vic.) as part of this programme which will eventually stabilize the administration of maritime offences as part of the orthodox criminal machinery.

Prize Structure

The function of the Prize Court is to determine whether goods captured in war constitute lawful prize and, if so, condemn them in favour of the Crown. By the 18th century, prize suits had become quite independent of other Admiralty business.[241] The Napoleonic Wars injected new life into the Court's activity and gave Lord Stowell the opportunity to develop the modern jurisprudence of prize.[242] Although courts of Admiralty are appointed to hear prize suits, the content of prize law must be treated as a specialized discipline peculiar to the international comity of war and divorced from the peace-time ambit of maritime law.[243] The procedure for the trial of prize suits was consolidated by the *Naval Prize Act* 1864 (U.K.) which acknowledged jurisdiction in the High Court of Admiralty and in the Vice-Admiralty Courts of the colonies, with appeal to Her Majesty in Council. With the passage of the *Colonial Courts of Admiralty Act* 1890 (Imp.) it was the intention of the imperial government to replace colonial Vice-Admiralty Courts with a new order of Colonial Courts of Admiralty and Vice-Admiralty Courts both of which could be vested with jurisdiction in prize.[244] The *Prize Courts Act* 1894 (Imp.) enacted that a prize court in British possessions would sit only upon commission and proclamation of war by the imperial Crown. The 19th century legislation was supplemented with *Prize Court Acts* 1915 and 1939 (Imp.) during the two

239 See *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177; *Pearce* v. *Florenca* (1976) 50 A.L.J.R. 670; *Chen Yin Ten* v. *Little* (1976) 11 A.L.R. 353; *Li Chia Hsing* v. *Rankin* (1979) 23 A.L.R. 151.

240 *Acts Interpretation (Amendment) Act* 1976 (Vic.); *Off-Shore Waters (Application of Laws)* 1976 (S.A.).

241 *Lindo* v. *Rodney* (1783) 2 Dougl. 613; 99 E.R. 385.

242 See Wiswall, op. cit. Ch. 1.

243 *The Zamora* [1916] 2 A.C. 77.

244 See *Civil Structure* infra p. 117.

world wars.[245] That prize had dissociated itself from *droits* of Admiralty and *droits* of the Crown is confirmed by the *Prize Act* 1948 (U.K.) which abrogates the Crown prerogative to grant *droits* in wartime.

Civil Structure

From its commencement in the respective colonies, the *Colonial Courts of Admiralty Act* 1890 dissolved the Vice-Admiralty Courts administered under the *Vice-Admiralty Courts Act* 1863. The repealing legislation made provision for three classes of courts in the colonies—Colonial Courts of Admiralty, Vice-Admiralty Courts and colonial courts of limited Admiralty jurisdiction. Dealing with them in reverse order, the minor classes can be disposed of summarily. Section 3(b) provides that the legislature of a British possession may by any colonial law confer partial or limited Admiralty jurisdiction on any inferior or subordinate court. The only exercise of this power to date is the *Broome Local Court of Admiralty Jurisdiction Act* 1917 (W.A.) which conferred on the Local Court at Broome in Western Australia jurisdiction over claims for mariners' wages and masters' disbursements which do not exceed $200 and in respect of ships of limited capacity. The second class of courts has never been created in Australia. Section 9 authorizes the imperial Crown to empower Admiralty to establish Vice-Admiralty Courts in British possessions, similar in constitution to the abolished courts but with jurisdiction restricted to prize, the navy, slave trade, foreign enlistment, Pacific islands, treaties and international law.

The major creation of the legislation was the replacement of the imperial courts with a colonial system of courts called Colonial Courts of Admiralty. Section 2 provides for colonial courts to exercise the Admiralty jurisdiction of the High Court in England, having regard to international law and the comity of nations, excluding jurisdiction over indictable offences and the Royal Navy. Colonial Courts of Admiralty are appointed in one of two ways. The legislature of a British possession may, by colonial law, declare any courts of unlimited civil jurisdiction (original or appellate) in that possession to be Colonial Courts of Admiralty.[246] If, at any time, no such declaration is in force, every court of unlimited civil jurisdiction (but only original jurisdiction) in the possession is deemed by the Act to be a Colonial Court of Admiralty.[247] In both cases s. 15 defines "unlimited civil jurisdiction" as civil jurisdiction unlimited as to the value of the subject matter at issue or as to the amount that may be claimed or recovered. Except in New South Wales and Victoria,[248] the Act was expressed to

[245] See also the *Prize Courts (Procedure) Act* 1914; *Naval Prize (Procedure) Act* 1916; *Naval Prize Act* 1918.
[246] S. 3(b).
[247] S. 2(1).
[248] S. 16(1)(a), First Schedule.

commence on 1st July 1891,[249] whereupon the Supreme Courts of the four Australian colonies became Colonial Courts of Admiralty.

Did the High Court likewise derive jurisdiction from the imperial legislation upon formation of the Commonwealth, an entity which did not exist at the passing of the *Colonial Courts of Admiralty Act* 1890? The issue was first resolved in *John Sharp & Sons Ltd* v. *The Katherine Mackall*[250] in the affirmative, a view which has consistently prevailed in the High Court.[251] In that case the plaintiff commenced an action *in rem* in the original jurisdiction of the High Court against the defendant ship alleging damage to cargo consigned to him. The defendant challenged the jurisdiction of the High Court to hear the suit and on demurrer the issue went to the Full Court. The successful argument proceeded on the footing that the *Colonial Courts of Admiralty Act* 1890 (Imp.) applies to courts of unlimited civil jurisdiction, from time to time established,[252] in a British possession. From this premise the reasoning flowed that as the High Court satisfied the definition of a court of unlimited civil jurisdiction, it too would constitute a Colonial Court of Admiralty if the Commonwealth could be classified as a "British possession". To solve that issue the Court[253] referred to the *Interpretation Act* 1889 (U.K.) s. 18(2) of which defined "British possession" as

> "any part of Her Majesty's dominions . . . and where parts of such dominion are under both a central and local legislature, all parts under the central legislature shall . . . be deemed to be one British possession."[254]

The High Court concluded that the Commonwealth is a British possession and the High Court a Colonial Court of Admiralty.

This line of reasoning has suggested the argument that the Supreme Courts of New South Wales and Victoria also became Colonial Courts of Admiralty on 1st January 1901 being courts of unlimited civil jurisdiction within the geographical confines of the Commonwealth, which is the relevant British possession.[255] The counter-argument is that the *Colonial Courts of Admiralty Act* 1890 (Imp.)[256] specifically precludes the Act from operating in New South Wales and Victoria until directed by the Order in Council which came into effect on 1st July 1911.[257]

Recognition of the Commonwealth as the relevant unit does raise a

249 S. 16.
250 (1924) 34 C.L.R. 420.
251 See *McArthur* v. *Williams* (1936) 55 C.L.R. 324; *McIlwraith McEacharn Ltd* v. *Shell Co. of Aust. Ltd* (1945) 70 C.L.R. 175; *Nagrint* v. *The Regis* (1939) 61. C.L.R. 688; *F. Kanematsu and Co. Ltd* v. *The Shahzada* (1957) 96 C.L.R. 477.
252 See also *McIlwraith McEacharn Ltd* v. *Shell Co. of Aust. Ltd* (1945) 70 C.L.R. 175, 192, 204.
253 (1924) 34 C.L.R. 420, 425, 432.
254 For criticism of this interpretation, see unpublished thesis of D. Cremean, *Australian Admiralty Jurisdiction* (1979).
255 *McIlwraith McEacharn Ltd* v. *Shell Co. of Aust. Ltd* (1945) 70 C.L.R. 175.
256 S. 16(1), (2), First Schedule.
257 Statutory Rules and Orders 1911 No. 440.

significant issue in Commonwealth-State relations. The *Colonial Courts of Admiralty Act* 1890 (Imp.) confers the status of a Colonial Court of Admiralty upon courts of unlimited civil jurisdiction only if no declaration designating the appropriate court or courts is in force.[258] It further provides that the legislature may declare any court in that possession to be a Colonial Court of Admiralty.[259] It follows that federal Parliament, being the competent legislature of the relevant colonial unit,[260] may so appoint a court or courts to the exclusion of State courts.[261] This was in fact attempted by the *Judiciary Act* 1914 (Cth) which incorporated s. 30A into the principal Act and declared the High Court to be a Colonial Court of Admiralty. In *The Katherine Mackall* the defendant contended the section was void. The imperial Act provides that a colonial declaration should be reserved for the signification of Her Majesty's pleasure.[262] The *Judiciary Act* 1914 was assented to by the Governor-General and over two years later was approved by imperial Order-in-Council. Isaacs J. took the view that this procedure did not comply with s. 60 of the Commonwealth Constitution which requires a proposed law that is to be reserved for the Queen's pleasure to be promulgated within two years, and was therefore void.[263] Starke J. was of the opinion that s. 60 did not apply.[264] Doubts about its validity were dispelled when s. 30A was repealed by the *Judiciary Act* 1939 (Cth).[265] Since then, the Commonwealth has not nominated a Colonial Court of Admiralty. Should such a declaration be contemplated, the *Statute of Westminster* has removed the need for the Royal assent to be procured.[266] Alternatively, federal Parliament may provide legislative content to a federal admiralty and maritime jurisdiction under s. 76(iii) Constitution which has been inertly conferred on State courts pursuant to *Judiciary Act* 1903 (Cth).[267] At present, the High Court[268] and the Supreme Courts[269] in each of the States and Territories are Colonial Courts of Admiralty.

258 S. 2(1).
259 S. 3(a).
260 S. 15.
261 *McArthur* v. *Williams* (1936) 55 C.L.R. 324, 359; *Union Steamship Co. of New Zealand Ltd* v. *The Caradale* (1937) 56 C.L.R. 277, 280.
262 S. 4.
263 (1924) 34 C.L.R. 420, 431.
264 Ibid. 433.
265 *McIlwraith McEacharn Ltd* v. *Shell Co. of Aust. Ltd* (1945) 70 C.L.R. 175, 189, 204; *Parker* v. *The Commonwealth* (1964) 112 C.L.R. 295, 298; *Lewmarine Pty Ltd* v. *The Kaptayanni* [1974] V.R. 465, 467.
266 S. 6; *Swift & Co. Ltd* v. *The Heranger* (1965) 82 W.N. (N.S.W.) 540.
267 S. 39(2); *SS Kaliba* v. *Wilson* (1910) 11 C.L.R. 689, 704; *John Sharp & Sons Ltd* v. *The Katherine Mackall* (1924) 34 C.L.R. 420, 428; *McArthur* v. *Williams* (1939) 55 C.L.R. 324, 360; *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688, 696. For the Constitutional implications, see Cremean, op. cit.
268 *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688; *McIlwraith McEacharn Ltd* v. *Shell Co. of Aust. Ltd* (1945) 70 C.L.R. 175.
269 *Dalgety & Co. Ltd* v. *Aitchison* (1957) 2 F.L.R. 219; *Swift & Co. Ltd* v. *The Heranger* (1965) 82 W.N. (N.S.W.) 540; *Burns Philp & Co. Ltd* v. *The Golden Swan* [1971] A.L.R. 511; *Lewmarine Pty Ltd* v. *The Kaptayanni* [1974] V.R. 465.

Australian Courts of Admiralty succeed to the jurisdiction of the High Court in England, but the jurisdiction at what date? Do legislative amendments to the English jurisdiction passed after the 1890 Act inhere in Australian courts; or is there a uniform date at which the Australian jurisdiction is frozen, and if so, what date; or did the Australian Courts succeed to jurisdiction at different times—the four original colonies in 1891, the Commonwealth in 1901 and New South Wales and Victoria in 1911? That these questions must be asked itself illustrates Australia's continuing dependence on the motherland—a colonial heritage which the United States judicially severed over a century ago—and demonstrates the unsatisfactory, even obsolete, structure of Admiralty in Australia.

The first question was answered by the Privy Council in *The Yuri Maru*,[270] on appeal from the Exchequer Court of Canada. There it was contended that the Canadian counterparts were entitled to hear an action *in rem* for breach of charterparty, pursuant to the *Supreme Court of Judicature (Consolidation) Act* 1925 (U.K.). In the absence of legislation extending jurisdiction to the colonies, the Judicial Committee held that the statutory enlargement of the English jurisdiction did not apply to Colonial Courts abroad. Rather, the intention of the Act was to bestow:[271]

> "... the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed."

Of course, their Lordships did not address themselves to the second and third questions, pertinent to Australia. Yet Australian *dicta* have construed *The Yuri Maru* decision at face value and state the jurisdictional content to be frozen at the 1891 commencement of the Act.[272] Accordingly, Australian courts would not automatically acquire English powers conferred by the *Merchant Shipping Act* 1894 (Imp.) unless expressly extended to the colonies. And consequently, Australian jurisdictions are deprived of the major reforms contained in the *Maritime Conventions Act* 1911 (U.K.) (which is not statutorily in force in Australia),[273] the *Supreme Court of Judicature (Consolidation) Act* 1925 (U.K.) and the *Administration of Justice Acts* 1956 and 1970 (U.K.) which came into force after the 1st July 1911 being the latest date when New South Wales and Victoria may have acquired jurisdiction.

Colonial Courts of Admiralty can derive jurisdiction after the appropriate commencement date from subsequent imperial legislation applying to the

[270] [1927] A.C. 906.
[271] Ibid. 915.
[272] *McIlwraith McEacharn Ltd* v. *Shell Co. of Aust. Ltd* (1945) 70 C.L.R. 175, 188, 197; *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688; *F. Kanematsu & Co. Ltd* v. *The Shahzada* (1957) 96 C.L.R. 477, 487; *Parker* v. *The Commonwealth* (1964) 112 C.L.R. 295; *The Terukawa Maru* v. *Co-operated Dried Fruit Sales Pty Ltd* (1972) 126 C.L.R. 170.
[273] See *Parker* v. *The Commonwealth* (1964) 112 C.L.R. 295; *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688; *S.G. White Pty Ltd* v. *The Mediterranean* [1966] Qd.R. 211.

colonies by paramount force[274] or from competent Australian legislation.[275] Otherwise Colonial jurisdiction equates with the pre-commencement jurisdiction of the High Court in England which in turn inherited the jurisdiction of the High Court of Admiralty immediately before the *Supreme Court of Judicature Acts*.[276] Accordingly, Australia must look to the *Admiralty Courts Acts* 1840 and 1861 (U.K.), other British legislation[277] and an inherent jurisdiction, as the source of their jurisdiction, notwithstanding that the United Kingdom may have since repealed the legislation and has rationalized her jurisdiction in England.[278] By virtue of the *Colonial Courts of Admiralty Act* 1890 (Imp.) s. 2(3)(a), "the Commonwealth" shall be substituted for "England and Wales" wheresoever appearing in British legislation.[279]

In Part 2 the author examines the role of the Action in Rem in the development of Admiralty jurisdictions and he outlines the structure, operation and content of the present Australian Jurisdiction.

274 E.g. the *Merchant Shipping Act* 1894 (Imp.) s. 472.
275 E.g. the *Navigation Act* 1912 (Cth), ss. 91, 262, 328.
276 1st November 1875.
277 *Merchant Shipping Acts* 1854 to 1889 (U.K.) but not County Courts, *Admiralty Jurisdiction Acts* 1861, 1869 (U.K.); *The Terukawa Maru* v. *Co-operated Dried Fruit Sales* (1972) 126 C.L.R. 170.
278 *Administration of Justice Act* 1956 (U.K.); see *The Queen of the South* [1968] P. 449.
279 *F. Kanematsu & Co. Ltd* v. *The Shahzada* (1957) 96 C.L.R. 477.