The Law Civil and Maritime:

Quebec Admiralty Courts

and the

Development of *in rem* Procedure

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Abstract

The Law Civil and Maritime: Quebec Admiralty Courts and the Development of in rem *Procedure* explores the development of the admiralty action *in rem* during the eighteenth and nineteenth centuries, through a study of original archival resources from the courts of admiralty in Quebec and in London, many of which have never before been studied. The admiralty courts of Quebec include Canada's first permanent admiralty court set up by the French, as well as a vice-admiralty court established by the English. Both courts would turn out to be the leading admiralty courts of their regime. That *in rem* process was developed by civilians is undisputed. However, the present enquiry traces the origins of the remedy through a study of Roman law, of continental civil and customary law and of French and English maritime law, all of which converge in the admiralty courts of Quebec City. The study of original court records in Quebec and in London illustrates the importance of *in rem* process, and helps solve the enigma of the true role of *in personam* process in admiralty. As shall be demonstrated, the only true admiralty remedy with links to the past is the admiralty action *in rem*.

Cette étude explore l'évolution de l'action réelle en amirauté au cours des dix-huitième et dix-neuvième siècles. Elle s'appuie sur l'analyse des archives des cours d'amirauté de Québec et de Londres, dont la plupart n'ont jamais été étudiées auparavant. Les cours maritimes de Québec incluent celle constituée par les Français comme première cour permanente d'amirauté du Canada, puis ensuite celle constituée comme cour de vice-amirauté par les Anglais. Parmi tous les tribunaux maritimes des colonies des deux empires, ce sont ces cours qui ont connu l'achalandage le plus élevé. L'action réelle en amirauté est indéniablement d'origine civiliste. Cette étude retrace toutefois également les origines romaine, continentale, française et anglaise de ce recours, convergeant vers les tribunaux maritimes de Québec. L'étude des archives des cours d'amirauté de Québec et de Londres rappelle l'importance du recours réel et permet de dénouer l'énigme du rôle de l'action personnelle en amirauté. L'action réelle en amirauté constitue le seul recours maritime ayant un véritable lien avec l'histoire.

Acknowledgments

It would take a lengthy text to truly thank all those who were instrumental in the preparation of this project. The work is indeed a project, in that it has resulted in 20 volumes and almost 10,000 pages of admiralty materials. At least three did not live to see the completion of the project. The late Dean Roderick Macdonald and the late Professor William Tetley of the McGill University law faculty, as well as the late Professor Denis Lemieux of the Laval University law faculty, were early proponents of the study, as was Justice Nicholas Kasirer, another former dean of law at McGill. More recently, Professors Jaye Ellis, Fabien Gélinas and Tina Piper of McGill have been actively involved in advising on the preparation of the present volume and their assistance has been greatly appreciated.

But access to the archives of the admiralty courts could never have been achieved without the assistance of so many others. The archives of the Quebec Vice-Admiralty Court were found in the records of the Federal Courts, and the assistance of the Courts Administration Service, and especially of Claude Laflamme, in charge of the Courts' documentation, resulted in generous access to the records, since transferred to the preservation centre of Library and Archives Canada in Gatineau. Access to the extant records of the French regime admiralty court has been kindly arranged by Rénald Lessard of the Direction des services aux usagers at Bibliothèque et Archives nationales du Québec, who offered continuous advice on the deciphering of pre-revolutionary French court hand. At the National Archives in Kew, England, the records of the High Court of Admiralty are so voluminous, and partly written in abbreviated Latin, that it would have been impossible to review so many without assistance. I would like to thank Ms. Jasmin Noryaly for her unwavering support in collecting materials and obtaining pictures of each record I requested.

The preparation of so many volumes of materials is a typist's nightmare, and I can only thank my former secretary, Andrée Allaire, for tirelessly copying and correcting the tables and transcription of the materials. All errors, whether of transcription or of opinion, are however, solely the responsibility of the author.

Finally, I thank Gaëtane for putting up with me without complaint during what seems still to be a never-ending project.

Preface

The present volume is part of a research project involving the review of all extant records of the admiralty courts active under the French in Quebec City from 1700 to 1760, as well as all extant records of the Quebec Vice-Admiralty Court between the establishment of the court in Quebec City by the British in 1764 and Confederation in 1867.

The project includes a table of all entries in the extant registers of hearings of the French regime court, as well as a re-constituted register of hearings in the vice-admiralty court. It also includes a table of all suits commenced in the vice-admiralty court, and a full-text transcription of select pleadings in each extant vice-admiralty suit between the creation of the court in 1764 and the commencement of the reporting of Quebec admiralty decisions in 1836. A table of all suits entered in the Warrant Books of the High Court of Admiralty in London over the entire period has been prepared in parallel, in order to compare and validate the importance of the Quebec admiralty courts. In all, there are 19 volumes of accompanying material from which the statistical foundations of the present volume have been drawn.

The writings of numerous authors and courts have given rise to many of the questions canvassed in this volume. A few general comments on the origins of the modern admiralty jurisdiction of Canada's Federal Courts were previously published in the *Journal of Maritime Law and Commerce*, and an overview of some of the questions canvassed was presented to a recent meeting of the judges of the Federal Courts. However, the present volume is otherwise entirely composed of original scholarship, never previously published, and based for the most part on the results of the review of the above archival documentation.

The sheer size of the project is such, that it would be impossible to publish it in its entirety. However, with the availability of electronic publishing and research, it is hoped that Bibliothèque et Archives nationales du Québec and Library and Archives Canada, where the records tabulated or transcribed are found, will be able to make available several of the volumes prepared as part of the project.

It is also hoped that the comments on these materials, and their publication as part of the project, will constitute a distinct contribution to the limited knowledge most of us have of the subject of

admiralty procedure, and of the intriguing concept of the admiralty action *in rem*. And perhaps most of all, to encourage the study of the history of our courts, and of the importance of Quebec City in the development of Canadian maritime law.

Outline

The Law Civil and Maritime: Quebec Admiralty Courts and the Development of in rem *Procedure* explores the development of the admiralty action *in rem* during the eighteenth and nineteenth centuries, through a study of contemporaneous and modern writers on British, French and Canadian admiralty law, as well as through a modular study of original archival resources from English and Quebec admiralty courts, many of which have never before been studied.

In rem process is a unique admiralty remedy. It is a procedure allowing a claimant to obtain the arrest of property upon which the claim is based. That property is usually a ship, but can also be a cargo or freight paid to carry a cargo. The arrest can be obtained without appearance before a judge, and regardless of the financial profile of the defendant. Proof of the likelihood of being able to execute a final decision on the merits of the claim is not required. This distinguishes *in rem* procedure from the seizure before judgment of modern civil-law jurisdictions and from the Mareva injunctions or freezing orders of modern common-law jurisdictions.

But is *in rem* process simply a tool, developed by admiralty practitioners to coerce the *in personam* defendant to attorn to the jurisdiction of the admiralty courts, at a time when the common-law courts were contesting the *in personam* jurisdiction of those courts? Or is it a stand-alone remedy against the *res* itself? And how was *in rem* procedure developed? Is it a variation of the *actio in rem* of Roman or continental civil law? Or of the simple seizures of customary French law? Or was it borrowed from the mesne process of English common law? Or from the foreign attachment process granted to citizens in French and English medieval municipal charters? The present enquiry compares arrest process in Roman, French and English civil procedure with *in rem* process in admiralty, in view of trying to answer these queries and to establish the origin and development of the remedy.

There are few contemporaneous writers on either English or French admiralty procedure, and only recently have legal historians turned their minds to the admiralty courts. Consequently, the works of Francis Clerke, who wrote on English admiralty procedure in Elizabethan times, and of Arthur Browne who did as much at the end of the eighteenth century, have been extremely influential. But modern legal historians of the likes of Marsden, Prichard and Yale have remained puzzled by the remedy. Admiralty decisions were not reported before the nineteenth

century, and virtually no contemporaneous author has researched the origins or development of *in rem* process. The only clues to admiralty process lie in the records themselves.

The first part of the enquiry reviews modern *in rem* procedure, and arrest process in Roman, French and English law, as well as the reforms brought about in British admiralty procedure in the nineteenth century. These systems will be compared to the descriptions of admiralty procedure in early modern literature and in the writings of twentieth-century legal historians. The second part will challenge these concepts through a review of the records of the admiralty courts of both the French and British regimes sitting in the City of Quebec, validated by the parallel review of select records of the High Court of Admiralty in London .

The period under Review

The period under review will be from the introduction of admiralty courts in North America in 1700 to Canada's Confederation in 1867. During the period, Quebec City was a unique admiralty setting, being the only city where permanent French and English admiralty courts sat for substantial periods. Quebec was also the most active colonial admiralty venue during this period under both the French and English regimes.

New France witnessed Colbert's all-encompassing Ordonnance de la Marine of 1681. That legislation was never registered before the Conseil supérieur in Quebec, and has left historians speculating as to whether it applied in New France. The Quebec admiralty court registers of hearings confirm that it was, and references to the Ordonnance de la Marine are common, and form the basis of the court's jurisdiction and decisions.

It should be recalled that the English High Court of Admiralty was a court of civil law with advocates and proctors educated not in the common-law Inns of Court or Chancery, but in continental civil law taught at Oxford and Cambridge. However, during the 1850s, advocates and proctors were given rights of audience in the courts of common law and common-law barristers and solicitors were allowed to appear in the High Court of Admiralty, thus effectively putting an end to the civilian profession in England.

The final English admiralty records confirm the migration from civil law and practice to a common-law approach and the records of the English court reviewed as part of the present enquiry end at the beginning of the 1860s. The Quebec vice-admiralty records are missing from 1848 to 1873 due to a courthouse fire. It was consequently felt that the end date of Confederation would be appropriate date for what were essentially Lower Canada courts of law.

The Four Modules

During the period under review, Quebec City was a powerful maritime setting and the largest ship-building centre on the planet. The British admiralty court in Halifax could boast more prize business, but no British admiralty court outside of London was more active on the civil or instance side.

Quebec City is also in the unique position of having extant records of admiralty courts created first by the French and then by the British. Four separate modules of admiralty records have been compared in view of better grasping the origin and development of *in rem* process.

A first module has involved the review of the records and files of the admiralty court set up in Quebec City by the French at the beginning of the eighteenth century. There are relatively few admiralty records that have survived, and they are in the Bibliothèque et Archives nationales du Québec (BAnQ). A composite record of all registers of hearings extant has been prepared.

A second module has involved the review at Library and Archives Canada (LAC) of the files of the Quebec Vice-Admiralty Court which was created in Quebec City shortly following the arrival of the British in 1759. The court continued to sit until admiralty jurisdiction was assigned to Canada's Exchequer Court pursuant to the Imperial *Colonial Courts of Admiralty Act, 1890*. There exist over 3,000 Quebec Vice-Admiralty Court suits running from 1764 to 1848, including more than 2,300 file bundles of original proceedings, each consisting of between a few and hundreds of pages of proceedings. A table has been prepared of all Quebec Vice-Admiralty Court files for the period under review, and select pleading from all extant files prior to the commencement of law reporting in Quebec in 1836 have been transcribed in full-text.

A third module has involved creating a composite record of proceedings from various extracts of the record found amongst the Quebec Vice-Admiralty Court files. All records extant for the period under study have been combined to create a chronological composite record of the court covering as much of the period as is possible.

The final module has involved the validation of the Quebec materials by the review of select English High Court of Admiralty records at the National Archives in Kew outside London. The research has primarily focussed on the review of the Warrant Books for the instance jurisdiction, class HCA 38. The study of Warrant Books from 1700 to the end of the Warrant Books series in 1859, allows a comparison of what was happening in the United Kingdom during the period under review. There were more than 11,000 entries made during that period, and the review has resulted in the preparation of a table of all suits initiated in that court during the period under review.

In all, the present enquiry will challenge the traditional view that *in rem* procedure is of Roman law origin, and will lift the veil on the origin and development of one of the most widely respected and feared juridical tools. The enquiry will demonstrate that the admiralty courts in Quebec, guided by English and Canadian civilians, applied and adapted a process entirely unique to maritime courts, and in many ways unlike present-day practice. That process involved the arrest of property and persons, and was much more than a simple tool to compel appearance. As shall be demonstrated, *in rem* process is the only remaining link to the admiralty courts of the past, and the development of that process owes much to the admiralty courts of the City of Quebec.

The Law Civil and Maritime:

Quebec Admiralty Courts and the Development of *in rem* Procedure

GENERAL INTRODUCTION: MARITIME LAW IN QUEBEC

If law can be defined as the binding rules of conduct of a society, then law must vary from one society to another. However, certain aspects of the law are transnational and apply in more than one location. One can think of the civil law as an example. Based upon the law as expounded by authors and judges in Rome in the first centuries of the Christian era, codified in the sixth century in the eastern Roman empire, and revived in Europe in the eleventh century, civil law today crosses national borders in North and South America and throughout Europe. Similarly, English common law has spread throughout the English-speaking world.

But no branch of law is more transnational than maritime law, which applies to ships trading around the globe. Maritime law, as known in most of the world today, has roots in civil law and has been greatly affected by common law due to the influence of England on the world of international shipping.

Perhaps due to this transnational aspect, maritime practitioners are forever drawn to the history and development of maritime law. The history of maritime law can be traced to civilizations navigating long before the Christian era. Even Justinian's Digest in 533 A.D. incorporated the maritime law of the Mediterranean as developed by the Rhodians hundreds of years previous.[1]

Maritime lawyers are as practical as lawyers in any other sector of law, but the practice of maritime law has always had its ups and downs. Booms in shipping markets or sea wars can result in practitioners being overrun with work, whereas shipping slumps have for centuries threatened the economic viability of maritime practice. For these reasons, and due to the continuity of maritime law, history has played a larger role in maritime law than in any other branch of the law.

Consequently, maritime lawyers, especially in slower times, can be given to romanticizing past eras of practice. For some, the ideal era might have been the second half of the thirteenth century in Barcelona when the *Consolat del Mar* was being developed. For others, it might have been the

[1] See D 14.2.1 as the most often referred-to but by no means the only example, citing Paul in book 2 of the *Views* where he refers to the Rhodian law of jettison, today codified in the York-Antwerp Rules, 2016.

heavenly dawn of English maritime law in the second half of the fourteenth century, when the warrant of the Court of Admiralty ran throughout England without the constraints of the statutes limiting admiralty jurisdiction.[2] For still others, it might have been the first half of the nineteenth century when the Napoleonic Wars were raging and Lord Stowell was developing prize law for the ages, as judge of the High Court of Admiralty. Some fanaticize about places. The buildings and library of Doctors' Commons were sold off and torn down in the 1860s, but the writings of Dickens and more modern writers, have kept alive the thought that this sacred site of maritime and civil law might have been preserved.[3]

And when a long history is combined with scanty case reporting, the romanticizing can go much farther than mere dreaming. It can become the source of rules of maritime law that judges and courts have surmised to be the substantive law of days gone by. The practice and procedure of maritime law prior to the nineteenth century has been a matter of opinion when it should be a matter of record. Because the records of the maritime law courts fill in where the law reports are missing, and should be consulted instead of relying solely on one's imagination to trace the origin and development of rules of maritime law.

But the present enquiry is neither a study of history nor a dreamy overview of days gone by. Rather, it involves a study of court records and files in view of determining whether the modern understanding of admiralty procedure is an accurate one, or one that is based on legal fiction.

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2 The earliest English statutes limiting admiralty jurisdiction are (1389), 13 Ric. II, stat. 1, c. 5, (1391), 15 Ric. II, c. 3 and (1400), 2 Hen. IV, c. 11. Note that the courts of admiralty were not the only civilian courts restrained by Parliament. The jurisdiction of the High Court of Chivalry was a similar target in (1389), 13 Ric, II, stat. 1, c. 2.

3 Doctors' Commons was the popular name for the premises and membership of the more formally styled College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts. A 17 year old Dickens worked as a freelance reporter in Doctors' Commons in 1829. See Paul Schlicke, *Oxford Readers' Companion to Dickens* (Oxford: Oxford University Press, 1999) at page 642. For Dickens oft-cited descriptions of Doctors' Commons, see *David Copperfield* (London: first published in 1849-50 by Bradbury & Evans), chapter 23, wherein the civilian courts and personnel of Doctors' Commons are described by Mr. Steerforth as "a mighty snug little party" and by Dickens' narrator, David Copperfield, as "a cosey, dosey, old-fashioned, time forgotten, sleepy-headed little family party". For an example of a modern writer romanticizing about what Doctors' Commons might have become, see Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons, London* (Berlin: Duncker & Humblot, 1988), at page 23, citing G.D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law*, (Oxford: Clarendon Press, 1977) at pages 104-106. Coquillette's book was earlier published in four parts in the *Boston University Law Review*. For Coquillette's article corresponding to his above references to Doctors' Commons see "Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607" (1981) 61 *B.U. L. Rev*. 1, at page 12.

More precisely still, this enquiry will explore the development of the admiralty action *in rem* as it has been known since the end of the seventeenth century.

Simply stated, admiralty actions *in rem* allow a claimant to obtain the arrest of a defendant ship or other property, either prior to judgment, in view of obtaining security to ensure that the eventual judgment will be satisfied, or following judgment, in execution thereof. The need to obtain interlocutory security in shipping claims is justified by the ease with which ships can move from one jurisdiction to another, thereby rendering difficult, if not impossible, the execution of a judgment against the ship in absence of an alternate method of securing its payment. Security can today take any one of several forms, including cash deposits, bank guarantees or undertakings from insurance companies.

Admiralty process can vary from country to country. Many countries of English law origin have developed *in rem* process based on the practice of the admiralty courts of England. Those courts were manned from the fourteenth to the nineteenth centuries by English civilians, trained in Roman law in the universities of Oxford and Cambridge, and not in the Inns of Court or Inns of Chancery, where common law was traditionally taught. The civilians had their own society and property called Doctors' Commons, situated near St. Paul's Cathedral in London. The High Court of Admiralty sat in Doctors' Commons from 1572, and the records of the court were created there by clerks and proctors practicing in the civil law courts.

Civil law countries do not use the term *in rem* as do those having inherited English maritime law, but have in many cases adhered to international maritime conventions providing for the arrest of vessels, based on *in rem* procedure. These conventions apply to vessels on international voyages. For claims concerning national shipping, several civil law countries have developed their own procedures to facilitate the arrest of ships and other property. The process is usually called a seizure before judgment or a conservatory seizure. As an example, France adopted a general conservatory seizure in the 1950s, which can apply to maritime claims where governed by national French law. The process extends the very limited conservatory seizure tradition that previously existed in France.

But what is the origin of *in rem* process and how has it developed? Is the admiralty action *in rem* simply the *actio in rem* of Roman law? And how can one determine the origin of a remedy that

has existed for centuries in England and in all commonwealth countries, as developed by English civilians?

The answer to these questions would require the full study of the workings of a court of admiralty over a long period of time. The study of the records and process of the High Court of Admiralty in London would be one candidate for study. However, the study of that court's records in a complete manner would require many years of dedicated research. It is for that reason that the review of the records of a more manageable but contemporary court was believed to be more advantageous. That court was found in Quebec City with its connections to French admiralty procedure and British vice-admiralty procedure, and the completeness of its records over the period under review.

The Period under Review

The period under review will be that of the eighteenth century and the first half of the nineteenth, from 1699 to Canada's Confederation in 1867. The principal forum will be the maritime law courts of Quebec in Canada. Confederation brought the provinces of Upper and Lower Canada, New Brunswick and Nova Scotia together to form the country of Canada. Of these provinces, Lower Canada, the Province of Quebec, was decidedly the oldest. As shall be seen, a specialized admiralty court was first designed for Quebec City by the French in 1699. Quebec City was then the capital of New France, and that year marks the starting point for the present enquiry. However, the period under review was not only a period of intense change in Quebec, but was a period of great change in England as well.

The law of the English courts changed radically during the eighteenth and nineteenth centuries, concluding with the merger of the superior, chancery and admiralty courts in 1875. The numerous commissions of inquiry into the state of legal affairs in the nineteenth century underline the need for reform. Admiralty law in England remained, throughout the period under review, in the hands of the English civilians, educated in the universities and practicing at Doctors' Commons. Their monopoly ended shortly before the end of the period under review, when all lawyers were given the right to appear before the admiralty courts. The civilians could not survive this change and disappeared as an independent order of learned lawyers.

Law reporting had been underway in the English superior courts since the thirteenth century, but only began to reveal the practice of the admiralty courts at the beginning of the nineteenth.[4] The Napoleonic Wars that followed were a great source of prize law, an exclusive jurisdiction of the admiralty courts, keeping admiralty practice and reporting alive.

From a doctrinal point of view, the period under review commences with the practice of the admiralty courts still described by reprints of the writings of Francis Clerke, a proctor in admiralty in the late sixteenth century, and witnesses the importance, in England and America, of the writings on admiralty and civil law of the Irish civilian Arthur Browne, LL.D., published at the beginning of the nineteenth century.

From a procedural point of view, the end of the period under review marks the beginning of a new era, both in England and in Canada. The merger of the English courts in 1875 saw the creation of the Probate, Divorce and Admiralty Division, keeping together a major portion of the subject matters which had been the bailiwick of the civilians. However, as the common lawyers could now plead before the admiralty judge, the civilians lost their specificity, and the renowned civilian Sir Robert Phillimore, who became admiralty judge and Dean of the Arches upon Dr. Lushington's retirement in 1867, would be the last civilian to occupy these positions. His retirement in 1883 coincided with new rules of practice for vice-admiralty courts, which marked the end of much of the ancient procedure in civil law.

In Canada, the end of the period under review is marked by Confederation and the beginning of a new country on the world stage. Although a country, Canada remained subject to English law in international respects, the most important of which, for present purposes, is the jurisdiction of the courts of vice-admiralty. These courts would remain in place for two more decades until the *Colonial Courts of Admiralty Act, 1890* gave Canada the power to create its own admiralty courts. Canada chose the Exchequer Court of Canada to exercise this role. However, with the admiralty rules and decisions in England now depending on common lawyers, and a merged set of rules of practice, the civilian aspect of the vice-admiralty courts lost its guiding light, and in

[4] The first volume of High Court of Admiralty law reports was published by Christopher Robinson, LL.D., in 1798, with the assistance of Butterworths as publisher. See Sir William Holdsworth, *A History of English Law*, vol. XII (London: Methuen, 1938), at pages 105 *et seq*.

this sense the end of the period under review marks the end of civilian influence on the admiralty.

Maritime Law and the City of Quebec

Quebec City was, during the period under review, a perfect microcosm of maritime commerce and of maritime law. It began as a French colony in 1541, when Jacques Cartier and Jean-François de Roberval tried unsuccessfully to create a permanent base for the French and then, from 1608, when Samuel de Champlain received a royal charter from Henri IV, king of France and Navarre, first of the Bourbon sovereigns, to found Quebec City as a permanent seat of government in New France. The French stayed permanently this time, and set up courts of law, including, from 1699, an admiralty court along the lines of the admiralty courts in France, applying French maritime law and manned by a surrogate or lieutenant who rendered justice in the name of the Admiral of France.

Then came the English during the Seven Years War who, following the Treaty of Paris in 1763, stayed and set up the Quebec Vice-Admiralty Court which brought English maritime law to Quebec. In 1763, the Royal Proclamation introduced English common law to Quebec, but eleven years later the *Quebec Act* reversed that, by re-establishing that portion of French law that had applied in private matters prior to the conquest. Courts in Quebec had at any rate been obliged to continue to apply some French law during the interval, and Quebec has ever since been a mixed jurisdiction, applying civil law to private law disputes and common law to public law disputes.

What about maritime law? The French court of admiralty set up in 1699 in Quebec was contemporaneous with the vice-admiralty courts set up by England in the American colonies. However, after the American Revolution, the main maritime seaports of Boston and New York, and their respective vice-admiralty courts, were no longer part of the British Empire. Quebec City, capital to a population spread in numerous ports along the St. Lawrence, would develop maritime activities and become the largest ship-building centre in the world during the period under review. As shall be seen, the Quebec Vice-Admiralty Court would be the British empire's most active civil or instance maritime court outside of London. The vice-admiralty court in Halifax was a major prize court, but in terms of the number of instance cases, the Quebec court was second only to London.

Quebec City, with its permanent French and English admiralty courts, is thus an excellent laboratory to study the practice of maritime law throughout the period under review. And the object of this enquiry is to explore the development of the most mysterious and intriguing aspect of maritime law, the admiralty action *in rem*.

The Law of the Civilians

That admiralty procedure in England, and later in Quebec, was the law of the civilians, is beyond doubt. The English civilians developed all aspects of English maritime law as a law separate and distinct from English common law. And English maritime law was received, with the arrival of the British, as the maritime law of Canada. The reception of English maritime law in Quebec fit smoothly with the tradition of civil law in Quebec, although the procedure of the admiralty courts was not always that of the former civil courts.

But civilian training alone cannot explain the origin and development of *in rem* process as part of admiralty law. The English civilians could not have been oblivious to the general practice of the common law. As shall be seen, mesne process allowing for the arrest of persons in common law actions on the case began in 1504, and the earliest English commentator on admiralty practice, Francis Clerke, was writing later in that century. It can thus be legitimately queried whether and to what extent arrest in the admiralty courts might be related to the practices of the courts of common law.

The work of modern legal historians has demonstrated that the *in rem* action as it is known today did not exist prior to the seventeenth century. The study of admiralty records by Cambridge professors Prichard and Yale concentrated on jurisdictional aspects of the admiralty courts, as part of their introduction to the works on admiralty of Sir Matthew Hale and William Fleetwood. However, Reginald Marsden had preceded them in reviewing the admiralty records of the sixteenth century, and had concluded that arrest process at the time could be issued not only against ships, cargoes and freight, but against any property of the defendant and was perhaps even more commonly issued against persons such as shipowners, masters and seamen.

Prichard and Yale conclude that, rather than originating from Roman law, arrest was a customary form of interlocutory process, whereby a defendant could be arrested, as could, in default

thereof, any of his assets. They suggest that personal arrest was used to compel the defendant to appear and submit to the jurisdiction of the admiralty court. This procedural theory of what was to become the action *in rem* would eventually be accepted by the English courts of admiralty in the leading case of *The Dictator*.[5]

As had the English courts in *The Dictator*, Prichard and Yale base their impression on the writings of Clerke, who describes two arrest possibilities, that of arresting persons and that of arresting property, without ever making use of the terms *in rem* or *in personam*. Marsden's research in the earliest extant admiralty records confirms that arresting persons and property was possible in sixteenth century England. Prichard and Yale conclude that the sole purpose of the arrest "must have been" to compel the defendant to appear.

Prichard and Yale do not however, base their conclusions on Clerke's writings alone. They also rely on the writings of Arthur Browne. Browne's treatise on admiralty, published at the beginning of the nineteenth century, reflects the more modern *in rem* and *in personam* vocabulary, if not modern *in personam* practice. Browne states that, in certain cases, what would give rise to *in rem* process also allows persons to be arrested, although in reference to personal contract claims, Browne notes that the general rule is that the admiralty acts only *in rem*. For Browne, arrest is the key to security, and not the *chasse gardée* of *in rem* claims.

From Clerke's writing, Browne notes the prior existence of the right to arrest any assets in admiralty and not only the wrongdoing property, and laments that an admiralty attachment had, "in latter times gone into disuse". This would seem to refer to some form of foreign attachment process available to admiralty courts, much as in United States practice today. But if Browne is correct in stating that a general admiralty attachment had gone into disuse, even if not "in latter times", and can it be revived today? And have the American courts correctly interpreted the notion of attachment as described by English civilian writers? If not, what is the origin of the notion of an admiralty attachment as it exists in modern American admiralty law? Indeed was there ever a time when distinct arrest and attachment processes would have coexisted in England as in American practice today?

[5] *The Dictator*, [1892] P. 304, 7 Asp. M.L.C. 251 (Adm.).

The possible sources of the development of the modern admiralty process *in rem* are multiple and the present enquiry will not reveal the precise origin of *in rem* process. In fact, the precise origin of *in rem* process before the British admiralty courts may never be determined with precision. But this enquiry will provide clues to the development of this most unique procedure and answers to some of the queries that shall be canvassed throughout.

Although the terms *in rem* and *in personam* are quintessentially Roman, Prichard and Yale assert that the admiralty action *in rem* is too specific to admiralty to be of Roman law origin. The terms were well known to the English civilians, but their absence in Clerke's writings indicates that they were not in use in his day, possibly because there was no need to differentiate between the arrest of persons and the arrest of property. The arrest of persons was obviously more important to Clerke, and there is indeed no reason to doubt that Clerke's statements reflect the admiralty practice of the day.

Relying on Clerke's writings, modern English and Canadian admiralty judges have concluded that *in rem* process is merely a procedural mechanism used to compel the shipowner to voluntarily attorn to the jurisidiction of the admiralty courts. Failing to do so puts the property arrested *in rem* at risk of sale without defence, as a *res* cannot defend itself. But the admiralty courts have determined that attorning means that the action also becomes *in personam*, thus binding the shipowner to pay the amount adjudged to the extent of all of the shipowner's assets, regardless of the value of the arrested property. American admiralty courts have generally taken the opposite view, that the arrested ship is personified by *in rem* process, and that the appearing owner only appears to claim his interest in the arrested property.

A justification for the English and Canadian view is that, prior to the beginning of the period under review, the admiralty courts had lost their jurisdiction over persons, as opposed to property, and that voluntary appearance was the only way to obtain *in personam* jurisdiction over the owner of the arrested property. If so, the procedural theory of *in rem* process may be substantiated. But if *in personam* and *in rem* processes co-existed throughout the period under review, this assertion needs to be revisited. The present enquiry will explore the theory.

Seizure of property in Roman law was a product of the *contumaciousness* of the defendant. But seizure required a default to take place. Could the arrest of a "potentially-contumacious"

defendant in admiralty procedure, due to the extreme volatility of maritime assets, explain why the arrest of property, i.e. any assets belonging to the defendant, might have appeared to Clerke as a secondary remedy, even though only available in admiralty courts? And to what extent the common law mesne process of the day might have influenced the civilians remains to be explored. Prichard and Yale make no mention of the possibility.

In a similar vein, does European or French law provide a clue to the development of *in rem* process? Roman law may not be the origin, but seizure in execution of judgment had become an essential part of French procedure and was codified in Colbert's civil procedure code or Ordonnance of Civil Justice of 1667. That code applied in Quebec throughout the period under review. Seizure before judgment was not a general remedy in France until long after that period had elapsed. Colbert's monumental Ordonnance of the Marine of 1681, like that of 1667, refers to seizure as a remedy for the execution of judgments only.

But France had customary law which was compiled at the beginning of the sixteenth century and which also came to Quebec with Champlain. These great customs of the French cities of the north provided for simple seizures, available without judgment, and yet unknown to Roman law. Could the simple seizure of medieval France be part of the development of *in rem* process in admiralty?

A further clue to interlocutory arrest is the practice in English and French *villes d'arrêt* of the foreign attachment or the seizure of goods belonging to foreigners. This process was known in both countries from medieval times as being a remedy of the residents of certain cities. But could Browne be correct in suggesting that it may have influenced the practitioners and courts of admiralty?

The Queries

The present enquiry will strive to answer these questions from half a dozen distinct viewpoints. First, given the civilian vocabulary of *in rem* and *in personam* process, has admiralty procedure in fact evolved from Roman law? Prichard and Yale discredit the theory, and their expertise in admiralty jurisdiction is unparalleled. However, they spend little time on procedural questions,

and a more in-depth study of Roman procedural law is required to see whether, and to what extent, the two may be related.

Secondly, is there a relationship between arrest in admiralty law and arrest process in contemporaneous continental civil law procedure or common law procedure? The English and Quebec admiralty practitioners did not live and work in a vacuum, and it is probable that procedural methods evolved in similar directions due to common thought of the day. To what extent could simple seizure in civil law or common law mesne process have been influential in the development of *in rem* and *in personam* process in admiralty?

Thirdly, is there a relationship between the foreign attachment available in certain French and English cities and admiralty process? Browne seemed to think there had been a link, but that it would have been abandoned by admiralty practitioners. The attachment process available today in the federal courts of the United States appears to be similar to foreign attachment. If so, could a similar attachment be revived in modern admiralty practice? These questions will require a review of foreign attachment and its potential relationship to admiralty arrest.

Fourthly, did British admiralty courts in London or in Quebec lose their *in personam* jurisdiction and, indeed, did they have such a jurisdiction at any time during the period under review? If they did, what would lead judges and writers to believe it was lost?

Fifthly, assuming that the records of either the French regime admiralty court in Quebec or the British vice-admiralty court there can demonstrate the development of admiralty process during the period under review, why were the terms *in rem* and *in personam* used so sparingly in the literature and in the courts themselves throughout the period?

And finally, will the review of the Quebec records, and of contemporaneous High Court of Admiralty records, determine which of the procedural or personification theories best explains admiralty process today? If the theory adopted in *The Dictator* cannot be substantiated, is the American view the answer, or is there some other explanation of the origin and development of *in rem* process?

All of these queries require answers. And the answers cannot be found solely in the study of admiralty caselaw, since the reporting of admiralty decisions only commenced at the end of the eighteenth century. Nor can they be found in the few books of admiralty practice published between Clerke's manuscripts and Browne's text. Rather, the present enquiry will involve the review of the records of the admiralty courts.

The admiralty courts of Quebec City are in the unique position of being the sole place where Roman, European, French, and English civil and common law came together during the period under review. It is for this reason that the present enquiry will focus on that jurisdiction to get a better view of the interplay of the courts and systems of law in developing *in rem* process. But the admiralty records of the English High Court of Admiralty for the contemporaneous period will also require review.

The present enquiry will demonstrate, largely through the review of archival sources, that the modern admiralty action *in rem* is in fact the direct descendant of the admiralty process known to Clerke, whereby any assets belonging to the defendant could be arrested to obtain security for the claim. The process of arrest in admiralty was doubtlessly available from the inception of the English courts of admiralty and the restrictive legislation of Richard II was brought about by an over zealous use of arrest by the court. In Clerke's day, however, the same arrest process was available against the defendant personally, who could be arrested along with or independently of his assets.

Although Clerke refers to such personal arrests as related to the default of the defendant to appear, arrest was available at the outset of the claim, and thus the concept of default was more one of legal fiction than of fact. But the arrest of assets gradually became related to the ship or assets that were the subject of the admiralty action, first with relation to the repairing and supplying of vessels, but by the commencement of the period under review the concept of a "wrongdoing" ship as the focus of all admiralty arrests *in rem* had already crystallized. As had the concept of the admiralty arrest of persons. Only the owner or master in charge of the ship in question could be arrested.

In this sense, there was no admiralty arrest *in rem* as opposed to an admiralty arrest *in personam*, but only the concept of admiralty arrest to obtain security. It will be demonstrated that admiralty

arrest continued to be against the *res* and against the persons in charge of the *res* well into the period under review and, in Quebec at least, until very near the end of the period. In England, it will be seen that the arrest of persons waned in the second half of the eighteenth century and by Browne's day, although still available, had become the exception rather than the rule.

But personal arrest remained available in England and in Quebec until the end of the period under review. It was only gradually during the nineteenth century that the concept of actions *in personam* took its modern meaning of an action against a personal defendant, enforceable against his assets but not his person. The admiralty action *in personam* thus bears an ancient name but is in fact a modern remedy, dissociated from the admiralty action *in rem*, which is directly linked to ancient admiralty practice.

There will be two parts to the enquiry. In the first, a review of modern admiralty process and procedure will be undertaken to better judge whether there are links to Roman law or to the various alternate legal procedures to be canvassed. The reforms of admiralty process from the nineteenth century will be reviewed to identify the ties to past admiralty procedure.

The second part will focus on procedure in the actual court records, both before the admiralty courts of the French regime and before the vice-admiralty courts of the British regime. The procedure of the courts will be seen in context with a selection of typical maritime cases handled by both courts. The processes of seizures before judgment and arrest in admiralty will be compared, as will be the possibility of the arrest of the person of the defendant.

But by way of introduction to the last of the above queries, the enquiry shall begin with an overview of the theories of whether *in rem* process is the personification of a vessel or a procedural tool to compel the "voluntary" appearance of the vessel's owner. It is hoped that this will set the stage for the study of the records of admiralty from Quebec and from London in order to determine whether the dichotomy is based in fact, or is simply a modern, and perhaps misguided attempt to explain what was once a singular process of arrest and security.

The concept of the arrest of a ship to compel the appearance of her owner would only appear to be justifiable if one accepts that the admiralty courts had no personal jurisdiction to directly compel the owner to appear. As shall be seen, the records dispel any such theory. And the

statistics of the number of personal arrests in admiralty dispels the theory that the common law courts had removed the effective use of personal arrest through prohibitions. That the admiralty courts in Quebec and in London had jurisdiction over persons is undeniable from a study of the records. Indeed, as shall be demonstrated, half of all admiralty suits in both London and Quebec involved personal arrest. All of which begs the question as to the true nature of *in rem* process.

THE NATURE OF *IN REM* PROCESS: PROCEDURE OR PERSONIFICATION?

The study of the development of the admiralty action *in rem* first requires the understanding that all legal actions, whether against an individual, a government, a partnership, a trust or a body corporate are actions against persons in the legal sense. Legal persons such as bodies corporate are personified, in that they can sue and be sued as can an individual. Thus for the vast majority of courts and actions, the court process acts *in personam* or against a person. The term is of Roman origin as shall be seen. But in no court but an admiralty court can a purely civil action be instituted against a thing as opposed to a person.[6]

The admiralty action *in rem* is a procedure peculiar to maritime law, whereby process is issued directly against a ship or other property without requiring the *in personam* impleading of the owner of the property. It is a real action in the sense that it involves property, but not property of the immovable kind, as a ship is a quintessential movable. It requires no *in personam* defendant, in that the *res* can be condemned and sold by the admiralty court to pay the judgment without the appearance of any defendant, even though all those interested in the *res*, and indeed the whole world, will be bound by the sale and by the *in rem* judgment. The sale of a ship by a court of admiralty delivers title to the buyer free and clear of prior claims of any nature.

The admiralty action *in rem* is today referred to in admiralty court statutes and rules such as the *Federal Courts Act* in Canada[7]. However, *in rem* process comes to Canada not from written procedural statutes or codes, but from the unwritten practice of civilians appearing before the

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[6] The civil forfeiture of property is sometimes referred to as an *in rem* remedy, in the sense that it is a statutory remedy taken directly against assets, and, indeed, its origins include the Navigation Acts and Customs legislation that are reviewed in this enquiry. However, the term is both older and more modern. In common law, concepts of deodand and escheat resulted in property being seized directly by the Crown. In more moden times, the war on drugs has resulted in civil forfeiture legislation, first popularized in the United States, whereby currency and property used to commit crimes or assets purchased with the proceeds of crime can be forfeited to the Crown, often for redistribution amongst the victims of the crime committed. In Ontario, the *Civil Remedies Act, 2001*, S.O. 2001, c. 28, the first provincial legislation on civil forfeiture, was held to be constitutionally valid by the Supreme Court in *Chatterjee v. Ontario*, 2009 CSC 19, [2009] 1 S.C.R. 624. Quebec has adopted similar legislation. See *An Act respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity*, S.Q. 2007, c. 34, CQLR, c. C-52.2. The legislation permits provincial courts to hear cases against property and to sell or forfeit property. However, these remedies are premised upon the existence of criminal or penal acivity, and are not considered, for the purposes of this enquiry, to be civil remedies in that sense, or true actions *in rem*. Only admiralty courts can exercise *in rem* process in absence of any criminal overtones.

[7] *Federal Courts Act*, R.S.C. 1985, c. F-7.

English admiralty courts. The practice has long been presumed to be of Roman law origin, and it is only recently that legal historians have turned their attention to its history.

The history of English law is not composed solely of common law. The civil law has also played a major role in England. Perhaps the best example is English maritime law which, until the merger of the courts of admiralty and those of common law in 1875[8], was referred to as the law civil and maritime. Maritime law was handled exclusively by civilians and admiralty judges chosen from among the advocates practicing civil law, who were trained in civil law at Oxford or Cambridge.

In modern admiralty practice, actions *in rem* are taken only against the ship, cargo or freight which is the subject of the action. Actions *in rem* can be taken to enforce a proprietary or possessory right to the *res* or to enforce a claim arising out of an obligation in contract or in tort involving the *res*. Certain contractual and tort claims result in maritime liens, for which a right *in rem* follows the ship into the hands of a third party, but other claims can only be exercised *in rem* where the ship remains in the hands of the person who was owner at the time the cause of action arose. But is an action *in rem* merely a procedural tool or a substantive remedy?

An admiralty action *in rem* is an action against a *res*, usually the "wrongdoing" ship, and is different and separate from any action *in personam* between persons, affecting their assets and property. In this sense, the difference between the two is a substantial one, and a judgment *in rem* does not become a judgment *in personam* by merger or otherwise, Nor does a proceeding *in personam*, even leading to judgment, prevent a new proceeding *in rem* from being issued for the same cause of action. That said, there is some confusion as to whether an action *in rem* is simply a procedure to compel the owner to appear and defend, or whether it is a substantive remedy against the *res*, in and of itself.

Frank Wiswall pointed out the confusion surrounding the nature of *in rem* actions in his landmark 1970 book on admiralty jurisdiction.[9] He traces the confusion to the English courts in

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[8] *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66. The High Court of Admiralty became part of the Probate, Divorce and Admiralty Division when the Act came into force on November 1, 1875.

[9] Frank L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice since 1800* (Cambridge: Cambridge University Press, 1970) [hereinafter Wiswall], at pages 155-208. See also Wiswall's later additional

the second half of the nineteenth century, when the common lawyers appearing before the admiralty courts for the first time, were struggling with the concepts of civil law and admiralty process. Wiswall is particularly critical of the decision of Sir Francis Jeune, the then newly-appointed President of the Probate, Divorce and Admiralty Division, in *The Dictator*.[10]

In *The Dictator*, the court considered an *in rem* action wherein the owners of the steam tugs *Woodcock*, *Eagle* and *Stormcock* claimed £5,000 for salvage services rendered to the steamship *Dictator*. The solicitors for the *Dictator* and her cargo and freight put in bail for that amount and undertook to appear. Consequently, the ship was not arrested. However, following a trial, the court, noting the large values at risk in excess of £179,000, granted an award of £7,500.

The plaintiffs sought to amend the endorsement on the writ, in order to exceed the original sum and bail. The endorsement was granted and the amount was confirmed on appeal. The defendant owners of the *Dictator* denied any liability for any amount beyond the original £5,000 for which they had agreed to provide bail. The plaintiff moved for leave to proceed personally against the defendants for more than the bailed sum. The question was thus whether the £2,500 excess amount could be obtained from the owners *in personam*.

Sir Francis Jeune decided that it could, concluding that the arrest of a ship *in rem* was at its essence only a procedural means to compel the shipowner's personal appearance. Jeune cited Francis Clerke's writings, which will be reviewed in more detail herein, but in Wiswall's view, failed to follow the reasoning of the Privy Council in the 1851 case of *The Bold Buccleugh.*[11]

The Bold Buccleugh concerned a collision in the River Humber. The ship sailed before being arrested, but an action against the owners of the steamship *Bold Buccleugh* was issued in Scotland where the vessel was seized and released against bail. Once released, the *Bold Buccleugh* was sold to a new purchaser without notice of the action pending in Scotland. The ship later returned to England and was arrested by a warrant *in rem* from the High Court of Admiralty. Her new owners were understandably surprised and argued *litis pendens*, but the High Court of Admiralty, Dr. Lushington, found that the Scottish action was *in personam* only,

comments *The Jurisdiction and Practice of the Admiralty Court Revisited* (Sydney: Ebsworth & Ebsworth, 1994).

10 *The Dictator*, [1892] P. 304, 7 Asp. M.L.C. 251 (Adm.).

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

and would not prevent a subsequent *in rem* action in admiralty. Consequently, the arrest would stand.[12]

On appeal to the Privy Council, the decision was rendered by Sir John Jervis, Chief Justice of the Court of Common Pleas. The case followed upon the adoption of the *Admiralty Court Act, 1840*,[13] which enlarged the purview of the jurisdiction of the High Court of Admiralty to include, among other things, the right to hear and determine claims on mortgages and questions of the title to ships.[14] These new powers were to be exercised *in rem*, but were they to mean that each additional head of claim created a new maritime lien or privilege as did traditional maritime claims?

The Bold Buccleugh was more concerned with the question of maritime liens than with *in rem* actions, but Sir John Jervis followed the reasoning of Justice Story in the American case *The Nestor*[15] to the effect that a maritime lien gives rise to an action *in rem*. Jervis turned this around to conclude that the contrary was also true, that wherever an action *in rem* is the proper remedy, a maritime lien exists.[16] In the event, this was only *dicta* and, as shall be seen, it is now clear that that is not the case, and that the additional heads of jurisdiction given to the admiralty courts do not create additional maritime liens.

However, Jervis also rejected the argument that arrest *in rem* is simply a means of compelling the appearance of the owners, and that, once they appear, the matter is to be determined without reference to the original liability of the ship.[17] This finding rejected what is now referred to as the *procedural* view of *in rem* actions, i.e. of being simply a device to compel the owners to appear. And this, unlike the question of whether a new maritime lien was created, was for present purposes the key finding in *The Bold Buccleugh*.

In *The Dictator*, Sir Francis Jeune noted that if the action had been initiated *in personam*, execution could be levied for the full amount of the award.[18] However, the action was taken

12 *The Bold Buccleugh*, (1850), 3 W. Rob. 220, 166 E.R. 944 (Adm.).
13 *Admiralty Court Act, 1840* (U.K.), 3 & 4 Vict., c. 65.
14 *Ibid*., ss. 3 and 4.
15 *The Nestor*, 18 Fed. Cas. 9, 1 Sumn. 73 (C.C. ME, 1831).
16 *The Bold Buccleugh*, (1851), 7 Moo. P.C. 267, at page 284, 13 E.R. 884, at page 890.
17 *Ibid*., at page 282, E.R. at page 890.
18 *The Dictator*, [1892] P. 304, at page 310, 7 Asp. M.L.C. 251, at page 253.

solely *in rem* and the question was thus whether the owners, by voluntarily appearing, became liable for the full amount. Jeune turned to the sixteenth-century English admiralty law treatise of proctor Francis Clerke, first published in Latin in 1667.[19]

Clerke stated that where a respondent appeared before the High Court of Admiralty he would be required to either provide bail for the amount claimed or go to prison. If the respondent failed to appear, he could be compelled to appear by the seizure of any of his assets. If he then appeared and gave bail, the action proceeded as it would have, had he originally appeared. If he did not appear, the action would continue and the seized assets would ensure payment of the judgment.

The main object of the seizure was clearly to secure bail. However, as will be seen, Clerke makes no reference to the terms *in personam* or *in rem*, and gives no indication that they were different types of admiralty procedure. In *The Dictator*, Sir Francis Jeune concludes nevertheless, that the distinction between actions *in personam* and actions *in rem* depended in Clerke's time on whether the person or the property of the defendant was arrested.[20]

Sir Francis Jeune then mentions *The Clara*[21], wherein Dr. Lushington, judge of the High Court of Admiralty, considered a collision case where the proceeds of sale of the wrongdoing ship were insufficient to pay all claims. Dr. Lushington states in *obiter* that claimants formerly had an action against the person of the owner or against the ship, but that arrest of the person had become obsolete. Dr. Lushington suggests there was a case deciding this in 1780, but gives no details. Jeune concludes that the arrest of property made no alteration of the character of the action as to the appearance of the defendant, and thus that, where the owners appear, the action *in rem* determines the amount of the liability and allows a means of enforcing against the *res*, but also against the appearing owners.[22]

The Dictator is seen as the leading case in English and Canadian maritime law, determining the action *in rem* to be a procedural process to compel the owners to appear *in personam* and, if they do, the action continues against them with unlimited liability, regardless of the value of the *res*, or any bail undertaking to pay up to the limit of the value thereof. American authors, including

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19 See Francis Clerke, *Praxis Curiæ Admiralitatis Angliæ* (London: William Crooke, 1667), *infra*, note 305.
20 *The Dictator*, [1892] P. 304, at page 312, 7 Asp. M.L.C. 251, at page 254.
21 *The Clara*, (1860), Swabey 1, 166 E.R. 986 (Adm.).
22 *The Dictator*, [1892] P. 304, at page 320, 7 Asp. M.L.C. 251, at page 256.

Frank Wiswall, have been very critical of this position, especially as an action *in rem* for a maritime lien may not require the personal liability of the owner at all, and thus cannot be explained as a process to force the owners to appear and recognize their liability.[23]

Wiswall points out that American admiralty judges generally prefer a second theory, referred to as the *personification* theory, whereby the *res* is treated as a true defendant and where the owners, if they appear, do so as claimants of an interest in the *res*, not as defendants.[24] This theory was adopted by Justice Holmes[25] and by Wiswall himself. Taking the ship to be a juridical entity, would result in the ship alone being liable for any amount claimed.[26] Thus, the action cannot bind the owners' personal liability, unless it is also an action *in personam* properly served on the owners as well as *in rem* on the *res*.

A third theory, sometimes referred to as the *conflict* theory,[27] arguably a spin-off of the personification theory, suggests that the action *in rem* was developed to secure the jurisdiction of the admiralty courts, at a time when the common law courts were issuing prohibitions to stay actions before those courts. The theory is based on a case before the Court of King's Bench in 1703[28] wherein it is stated that the action against the shipowner would be stayed by prohibition, but that the suit against the ship would be allowed to proceed in the admiralty courts. The conflict theory was first suggested by Roscoe,[29] the assistant admiralty registrar, and further developed by admiralty commentators.[30]

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23 See Wiswall, *supra*, note 9, at pages 158-180.

24 *Ibid*., at page 164, quoting Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell, 1940), at page 117 [hereinafter Price]. The doctrine is generally traced to the case *The Little Charles*, 26 F. Cas. 979 (C.C.D. VA 1818), where Chief Justice Marshall, at page 982, states that the vessel committed the offence.

25 O.W. Holmes, *The Common Law* (Boston: Little Brown, 1881), at pages 25 *et seq*.

26 Certain authors base their understanding of the personification theory on the thirteenth century Catalan *Consolat del Mar*, although the accuracy of the citation may be nebulous. See Price, *supra*, note 24, at page 6, quoting Sir Travers Twiss, *Black Book of the Admiralty* (London: Rolls Series, 1871) [hereinafter *Black Book*], vol. 3 at pages 245 and 345.

27 The term is from D.R. Thomas, *Maritime Liens* (London: Stevens & Sons, 1980), at page 8 [hereinafter Thomas]. See also by the same author "The sister ship action *in rem*" [1979] 2 *LMCLQ* 158. The theory is also referred to as "Roscoe's Theory". See Neill Hutton, "The Origin, Development, and Future of Maritime Liens and the Action *in rem*" (2003) 28 *Tul. Mar. L.J.* 81.

28 *Johnson v. Shippen*, (1703), 2 Ld. Raym. 982, 91 E.R. 154 (K.B.).

29 E.S. Roscoe and T.L. Mears, *A Treatise on the Admiralty Jurisdiction and Practice of the High Court of Justice*, 3rd ed. (London: Stevens & Sons, 1903), at page 44.

30 See E.F. Ryan, "Admiralty Jurisdiction and the Maritime Lien: an Historical Perspective" (1968) 7 *Western Ontario L.R.* 173. See also Price, *supra*, note 24, at page 10.

According to Roscoe, common law prohibitions throughout the seventeenth century resulted in the admiralty courts losing almost all jurisdiction *in personam*, and thus the power to take action against individuals. This drove the admiralty courts to arrest property in the first instance, on the basis of a civil law hypothecation, to ensure jurisdiction over the *res*, if not over its owner. For Roscoe, this would have led to the demise of the arrest of persons in admiralty and to the rise of the process later termed *in rem*.[31] But Roscoe cites no authority to support this point other than the one Court of King's Bench decision of 1703.

All of these theories have their strengths and weaknesses. And although the procedural theory has been generally adopted in Britain and Canada, and the personification theory in America, both have their detractors. Wiswall is certainly a detractor of the British and Canadian viewpoint. But the personification theory is not universally espoused by American authors and courts and has also been criticized on many occasions.[32]

Even the conflict theory can be criticised. It is based on the premise that the admiralty courts had *in personam* jurisdiction at one point, but lost the jurisdiction due to common law court prohibitions in the seventeenth century. Thus the parties commenced suing only the ship to avoid prohibitions. But the case relied upon, *Johnson v. Shippen*, concerned a claim on a hypothecation of the ship by the master in the port of Boston where the ship was obliged to enter for urgent repair. At no time was the shipowner personally liable, so no *in personam* remedy was available. The King's Bench upheld the suit against the ship, but prohibited the suit against the owner.

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[31] The Canadian author Mayers agrees with these comments, although he does not attribute the theory to Roscoe. See E.C. Mayers, *Admiralty Law and Practice in Canada* (Toronto: Carswell, 1916), at pages 9 *et seq*.

[32] Although the present enquiry is not primarily focussed on post-revolution American maritime law, there have been numerous articles and textbooks referring to the personification theory as a useless fiction. See, for example Grant Gilmore and Charles L. Black, *The Law of Admiralty*, 2nd ed. (New York: The Foundation Press, 1975), at page 615, and Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 6th ed. (Eagan: Thomson Reuters, 2018), vol. 2 at pages 595 *et seq*. See *Continental Grain v. Barge FBL-585*, 364 U.S. 19, at pages 22-23. See also, K.D. Kerameus, "Admiralty Jurisdiction in Continental Countries" (1983) 8 *Mar. Law*. 329; David M. Collins, "Comments on the American Rule of *in rem* Liability" (1985) 10 *Mar. Law*. 71; Alex T. Howard, Jr., "Personification of the Vessel: Fact or Fiction?" (1990) 21 *J. Mar. L. & Com*. 319; George K. Walker, "The Personification of the Vessel in United States civil *in rem* Actions and the International law Context" (1991) 15 *Tul. Mar. L. J*, 177; Michael Jonsson, "The Nature of the Action *in rem*" (2001) 75 *Austl. L.J.* 105, and Paul Myburgh, "Arresting the Right Ship: Procedural Theory, the *in personam* Link and Conflict of Laws" in Martin Davies, ed., *Jurisdiction and Forum Selection in International Maritime Law* (The Hague: Kluwer, 2005). But see also Martin Davies, "In Defense of Unpopular Virtues: Personification and Ratification" (2000) 75 *Tul. L. Rev*. 337.

Clearly, this fact situation cannot be interpreted as a rule that no suits were allowed in admiralty against owners.

But theories about the nature of *in rem* process, somewhat like theories about maritime liens and about the effect of writs of prohibition, are designed to explain the working of the admiralty courts. The theories are only invoked in a narrow slice of *in rem* suits, where the damage suffered exceeds the value of the wrongdoing *res*, when the owner of the *res* is not personally liable to the claimant, or where insufficient proceeds of sale of the *res* give rise to potential competing priorities. The theories are cause for academic debate more often than judicial debate, and should not be seen as the essence of the development of *in rem* process, but rather as an often fictitious derivative of that process.

It is however clear that the dominant theory in England and in Canada is the procedural theory, and thus the voluntary appearance of the owners of the *res* grafts or superimposes an action *in personam* on the action *in rem*, whether or not the owners were served separately from the *res*, or even identified as parties in the style of the action.[33] In *The Indian Grace (No. 2)*,[34] the House of Lords considered an action *in rem* taken by India against a ship that had transported a cargo of munitions. Following a fire, some of the munitions in the hold where the fire was located had to be jettisoned and eventually the remaining munitions had to be destroyed, having been exposed to the heat of the fire.

Proceedings *in personam* were filed in India, first for the jettisoned munitions and, in separate proceedings, for the entire balance of the cargo, and judgment was obtained for the jettisoned munitions. However, before judgment in the second Indian action, India started a fresh *in rem* action in England for the cargo which had to be destroyed. The defendants argued that the action should be dismissed on the basis of section 34 of the *Civil Jurisdiction and Judgments Act 1982*,[35] which barred English proceedings where judgment has been given on the same cause of

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[33] The question was first considered by Canada's Supreme Court in *The A.L. Smith and The Chinook v. Ontario Gravel Freighting Company* (1915), 51 S.C.R. 39. The Court expressed various opinions, but Duff, J, as he then was, felt bound by the reasons of Sir Francis Jeune in *The Dictator*, [1892] P. 304.

[34] *The Indian Grace (No. 2)*, [1998] A.C. 878 (H.L.).

[35] *Civil Jurisdiction and Judgments Act 1982* (U.K.), c. 27.

action between the same parties. Several years of litigation followed,[36] but the final judgment, dismissing the *in rem* action, was rendered by Lord Steyn for the House of Lords.

Relying on *The Bold Buccleugh* and *The Dictator*, Lord Steyn discusses the procedural theory and the personification theory. He considers the latter theory was more attractive to civilians than the former,[37] but that the breakthrough was in *The Dictator*, ever since which, the procedural theory has prevailed. However, Lord Steyn recognizes the difficulty with the procedural theory when a maritime lien is involved and, as *The Indian Grace (No. 2)* did not involve a maritime lien, did not feel obliged to come to a definite decision on which theory prevails.[38]

The procedural theory pre-supposes that the defendant shipowner is personally liable for the claim, and that *in rem* process is simply a tool to compel him to appear. Once he appears, the suit becomes an *in personam* suit against him. However, there are cases where *in rem* suits can be taken without the personal liability of the present or any previous owner, including hypothecation cases such as *Johnson v. Shippen*, or where the suit is based on a bottomry or respondentia bond. Can the procedural theory explain the origin of the admiralty action *in rem*?

Perhaps none of the theories can fully explain the origin and development of the admiralty action *in rem* but, according to Wiswall, Jeune's ruling in *The Dictator* was the result of the arrival of the common lawyers in the courts of admiralty and demonstrates the absence of a clear understanding of admiralty process *in rem*. It is that process that will be reviewed in this enquiry.

Wiswall does not purport to demystify the origin and development of *in rem* process. If the answers to the queries set out by Wiswall cannot be found in the published decisions, there can be but one place to look, and that is in the records of the admiralty courts. Wiswall declares the "mystery" will have to be solved by those "more competent to deal with the very early history of English admiralty".[39] His study, as the title of his book indicates, was based on admiralty decisions and writings published since 1800.

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36 The case went to the House of Lords twice, the first time as *The Indian Grace*, [1993] A.C. 410.
37 *The Indian Grace (No. 2)*, [1998] A.C. 878, at page 908.
38 *Ibid*., at page 908, where this "separate and complex subject" was "put to one side".
39 Wiswall, *supra*, note 9, at page 166.

But exploring the evolution of the admiralty action *in rem* also requires the review of eighteenth century practice as will be demonstrated in this enquiry. There is little doubt that the concept of admiralty actions *in personam* and *in rem* evolved gradually and, as shall be seen, that the terms were not used to describe admiralty process before the beginning of the nineteenth century. The "sculpturing process"[40] of removing what was not wanted to reveal what is today called the admiralty action *in rem*, took all of the seventeenth century and, as the period under review commences, the process was as yet unnamed but, as shall be seen, was in full development.

The Selden Society has published three volumes on early admiralty practice, the most recent of which was published in 1993 by Professors Prichard and Yale of Cambridge University. Entitled *Hale and Fleetwood on Admiralty Jurisdiction*,[41] the volume includes a transcription of the treatises on admiralty jurisdiction of Sir Matthew Hale, a seventeenth-century English judge and William Fleetwood, a sixteenth-century serjeant-at-law. But the most valuable part of *Hale and Fleetwood* is probably the introduction by Prichard and Yale.

Spanning more than 250 pages, the introduction reviews admiralty jurisdiction immediately prior to the period under review in this enquiry, from the beginning of the professional practice of Fleetwood in the mid-sixteenth century, to the death of Hale at the end of the seventeenth century. It was a troubled time in England, both for the monarchy and for the admiralty courts, due to constant struggles for power with the courts of common law.

On the subject of the particularly difficult question as to when and how the admiralty action *in rem* came to exist, the introduction to *Hale and Fleetwood* includes a short chapter entitled "From Process to Action *in rem*". Only ten pages in length, the chapter represents the thesis of modern English legal historians on how the action *in rem* evolved in admiralty proceedings.

Prichard and Yale suggest that the process of arresting any property was not based on the notion of a right *in rem*, but rather on the notion of punishing a defendant for his refusal to appear and

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40 The term is from Ryan, *supra*, note 30, at page 196.

41 M.J. Prichard and D.E.C. Yale, *Hale and Fleetwood on Admiralty Jurisdiction* (London: Selden Society Publications, vol. 108, 1993) [hereinafter *Hale and Fleetwood*]. The other Selden Society volumes are R.G. Marsden, *Select Pleas in the Court of Admiralty* (London: Selden Society Publications, vols. 6 and 11, 1894 and 1897) [hereinafter *Select Pleas I* and *II*]. Together these three volumes capture the essence of the modern understanding of the origins of the High Court of Admiralty and of its struggles with the common law courts over a period of five centuries.

submit to the jurisdiction of the admiralty courts.[42] They conclude that admiralty process *in rem* demonstrated an ambivalent character straddling that which today is purely *in personam* and that which has become *in rem*.

In order to make this assertion, Prichard and Yale refer to medieval continental civil procedure. Citing the *Ordo Judiciorum*,[43] an Italian fourteenth or fifteenth century civil procedure guide now in the British Museum, Prichard and Yale note that where the defendant failed to appear, there resulted an interlocutory *primum decretum* or first decree, putting the plaintiff in possession of property formerly in the possession of the defaulting defendant.

The authors note that in a real action, called *actio in rem*, where the plaintiff claims title to disputed property, the default of the defendant led to the plaintiff being put in legal possession of that which the plaintiff claimed to be his own. In a personal action, called *actio in personam*, the plaintiff was given the temporary custody of the *res*, but no juristic possession, as no proprietary right was claimed. [44]

Consequently, the authors conclude that the admiralty action *in rem* is not a direct descendant of Roman law. But this thesis too needs to be tested, against the underpinnings of classical Roman law, against the civil law of the Continent derived from that law or from local custom, against the process of the common law courts where, as shall be seen, arrest was a tool commonly in use from the sixteenth to the nineteenth centuries, and especially against the records of the admiralty courts during the period under review.

In order to validate the conclusions of Prichard and Yale, and to explore the origin and development of the admiralty action *in rem*, it will be necessary to review the development of civil law in Rome, in France and in England, and to review the records of the admiralty courts in Quebec and in London.

This is precisely what will be undertaken in the present enquiry, in view of gaining a better understanding of the admiralty action *in rem*. The origin of the remedy and especially its

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42 *Ibid.,* at page xl.

43 *Ordo Judiciorum* is the title given by Twiss to the manuscript copy of an untitled procedural guide included in *Black Book*, *supra*, note 26, vol. 1 at page 178.

44 *Hale and Fleetwood*, *supra*, note 41 at page xl.

development will be revealed by the study of the records of the admiralty courts. In an age when there were no judicial statistics, the study of the records will provide the raw data required to better grasp the procedure as it was actually used before the admiralty courts during the period under review.

But before delving into the development of *in rem* process, it would appear useful to begin with the present, and a general understanding of what *in rem* process has come to mean today.

PART I

ADMIRALTY THEORY:

ACTIONS *IN REM* AND *IN PERSONAM*

The admiralty action *in rem* has been a tool of the admiralty courts in the United Kingdom and in Canada for a very long time. In this part, the theory of admiralty process *in rem* will be reviewed throughout several periods, ranging from Roman law to the British reforms of the nineteenth century. The role of continental civil law and that of the civilians in England will be a special focus of the review. But so will the contemporary British common law, with its own mesne remedies for the arrest of persons and property. As a starting point however, a review of the nature of the *in rem* action as it is known today, will set the stage for looking into its history and development.

In Rem Actions and Admiralty Jurisdiction Today

There is no doubt that *in rem* process has always been peculiar to courts of admiralty, but what is an action *in rem* today? *In rem* process is a form of proceeding against property, and remains the main feature of the courts of admiralty, differentiating maritime claims from non-maritime claims. It has a greater effect than simply coercing a defendant to appear in court as suggested by the procedural theory put forward by Sir Francis Jeune in *The Dictator*, and is more than the simple personification of the *res*. But it is a procedure nonetheless.

In rem process is taken against the ship or other property that becomes a defendant to the action. The *res* could thus be said to be personified, as in no court other than an admiralty court can a thing be made a true party to a civil suit. The arrest of the *res* can be obtained from the admiralty court and only there can the *res* be sold to satisfy the claim out of the proceeds of sale, free and clear of all prior claims. All of this can be accomplished without the appearance of anyone on behalf of the *res*, and without personal service on the owner of the *res* or on anyone on his behalf.

Any court can proceed by default against the person of the defendant, and can order execution against the defaulting defendant's property, but only an admiralty court can order the sale of property free and clear of all prior mortgages and other charges without notice being given to any

person, the service of the warrant of arrest on the *res* itself being deemed notice to the whole world. This is not to be confused with the execution of the sale by auction, which will invariably be published in order to draw the highest possible number of bidders. But the commission authorizing the sale of the property needs no publicity beyond the service of the writ and warrant on the *res* itself.

In rem process is so closely linked to admiralty jurisdiction that one must first review that jurisdiction in order to determine when an admiralty action *in rem* can be taken. As the scope of this enquiry is to study the process of the courts of admiralty in Quebec, it would appear appropriate to review the present jurisdiction of Canadian admiralty courts.

In Canada today, admiralty process comes under the legislative jurisdiction of the federal Parliament and current legislative provisions appear in the *Federal Courts Act*[45] and the *Federal Courts Rules*.[46] Prior to 1971, admiralty jurisdiction was administered by the Exchequer Court of Canada by virtue of the *Admiralty Act*.[47] Under that enactment, the Exchequer Court continued to exercise admiralty jurisdiction in Canada, as it had done since the coming into force of the original *Admiralty Act, 1891*.[48] The 1891 Act gave effect to the British *Colonial Courts of Admiralty Act, 1890*[49] whereby "every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of admiralty ... shall be a court of admiralty, with the jurisdiction in this Act mentioned, ... and ... referred to as a Colonial Court of Admiralty."[50]

Colonial Courts of Admiralty were empowered with the admiralty jurisdiction exercised by the High Court of Admiralty.[51] Canada enacted the *Admiralty Act, 1891*[52] on July 31, 1891. The

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45 *Federal Courts Act*, R.S.C. 1985, c. F-7. It will be noted that the word "Courts" is written in the plural in the title of the Act presently in force, but was used in the singular in the original 1970 *Federal Court Act*, S.C. 1970-71-72, c. 1, enacted in December 1970 and in force on June 1, 1971. This is due to the splitting of the appeal division into a separate court, which took place in 1998. For present purposes, the change has no effect on admiralty and maritime jurisdiction and thus needs no further consideration. However, a reference to the original 1970 enactment will reproduce the title as it then was.

46 *Federal Courts Rules*, SOR/98-106.

47 *Admiralty Act*, R.S.C. 1970, c. A-1.

48 *Admiralty Act, 1891*, S.C. 1891, c. 29.

49 *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27.

50 *Ibid*., s. 2.

51 *Ibid*., s. 2(2).

52 *Admiralty Act, 1891*, S.C. 1891, c. 29.

Canadian enactment vested admiralty jurisdiction in the Exchequer Court for all navigable waters in Canada, whether tidal or not, and conferred rights and remedies on persons anywhere in Canada, whether or not vice-admiralty jurisdiction had previously extended to such places, "arising out of or connected with navigation, shipping, trade or commerce".[53]

According to the *Colonial Courts of Admiralty Act, 1890*, the passage of the Canadian admiralty legislation required the assent of Queen Victoria, as did any rules of court adopted for the new admiralty jurisdiction, and final appeals of admiralty decisions remained with the Privy Council.[54] Canada had become a country in 1867[55] but becoming a country does not mean obtaining full sovereignty.[56] Canada was a new country, but retained its former colonial status with regard to international affairs, which included admiralty, and Canada remained subject to certain imperial powers such as that of reservation and disallowance and the power to appoint certain judges, including those of the vice-admiralty courts and the Privy Council.[57]

Another restriction was the incapacity of Canada to enact any statute repugnant to British statutes applicable in Canada. Imperial statutes adopted in England but applicable to the colonies, including Canada, could not be amended by Canadian statutes, although the local legislatures could amend the general common law received from England. This nuance appears in the *Colonial Laws Validity Act, 1865*.[58] Two years later, at the time of Confederation, the effect of the imperial statutes, including the *Colonial Laws Validity Act, 1865*, was expressly reserved, thus preserving the colonial status of the new country.[59]

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53 *Ibid*., s. 4. Prior to 1891, Canada's only admiralty court in non-tidal waters was the Ontario Maritime Court, which was discontinued by the 1891 enactment. See *infra*, note 474.

54 *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27, ss. 4, 6 and 7. Canada enacted the *Admiralty Act, 1891*, S.C. 1891, c. 29 on July 31, 1891. It came into force on October 2, 1891. Admiralty rules were adopted in 1892 and came into force on June 10, 1893, after receiving the approval of Her Majesty in Council on March 15, 1893, upon the recommendation of the Lords Commissioners of the Admiralty in London, as required by section 7 of the *Colonial Courts of Admiralty Act, 1890*. That requirement would only be removed with the adoption of the *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, s. 7, reprinted in Canada, R.S.C. 1985, Appendix II, no. 27.

55 *Constitution Act, 1867*, originally entitled *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in Canada, R.S.C. 1985, Appendix II, no. 5.

56 See, for example, Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) [hereinafter Hogg] at paragraph 3.1 where the author warns of the dangers of confusing confederation with independence.

57 *Ibid*. However, the salary of the vice-admiralty judges was to be paid by Canada. See the *Constitution Act, 1867*, *supra*, note 55, at setion 100.

58 *Colonial Laws Validity Act*, *1865* (U.K.), 28 & 29 Vict., c. 63, at s. 3.

59 Hogg, *supra*, note 56, at paragraph 3.2.

It would not be until 1931 that Canada would become fully sovereign over all international affairs through the enactment of the *Statute of Westminster, 1931*[60] which repealed the application of the *Colonial Laws Validity Act, 1865* as concerns Canada and its provinces, except for the amendment of the *Constitution Act, 1867*.[61] It was only in 1982 that Canada received the power to amend its own constitution with the enactment of the *Canada Act 1982*.[62]

Following the adoption of the *Statute of Westminster, 1931,* Canada's *Admiralty Act, 1934*[63] was enacted for the first time under the full sovereignty of Canada, but was hardly a hallmark of Canadian originality, as it continued the jurisdiction vested in the Exchequer Court since 1891 by enacting, as a schedule, the jurisdiction vested in the British High Court by the then current *Supreme Court of Judicature (Consolidation) Act, 1925*[64]. The 1934 Act remained virtually intact for almost forty years[65] and, in the statutory revision of 1970, became the revised *Admiralty Act* to which the *Federal Court Act* referred in 1970, still including the jurisdiction schedule which referred to the 1925 British enactment.

The 1970 *Federal Court Act* incorporated for the first time several new provisions that were not in the English admiralty enactments or in the previous Canadian versions. First, the new Act included a definition of "Canadian maritime law" which was said to mean "the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, ... or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament."[66] This new definition incorporated the former admiralty law administered by the Exchequer Court, but added new jurisdiction by

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60 *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, ss. 2 and 7, reprinted in Canada, R.S.C. 1985, Appendix II, no. 27.

61 *Constitution Act, 1867*, *supra*, note 55.

62 *Canada Act 1982* (U.K.), c. 11, reprinted in Canada, R.S.C. 1985, Appendix II, no. 44. The *Constitution Act, 1982* is Schedule B to the *Canada Act 1982*.

63 *Admiralty Act, 1934*, S.C. 1934, c. 31.

64 *Supreme Court of Judicature (Consolidation) Act, 1925* (U.K.), 15 & 16 Geo. V, c. 49.

65 Only four sections of the 1934 enactment were amended prior to 1970. Sections 7, 13 (both amended by S.C. 1966-67, c. 4), 14 (originally added as new section 14A by S.C. 1963, c. 19) and 24 (amended by S.C. 1935, c. 1) were amended and, in the revision of statutes undertaken in 1970, prior to the coming into force of the *Federal Court Act* adopted that year, a few other provisions of the *Admiralty Act* as previously revised in 1952 were omitted as redundant. This included former section 14 concerning registrars in office in 1935, thereby re-numbering section 14A as new section 14. None of the changes between 1934 and 1970 however, concerned the jurisdiction of the Admiralty Court.

66 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 2.

reference to maritime and admiralty matters that would have fallen to the Exchequer Court had it had unlimited jurisdiction over such matters.[67]

A second novelty was the addition of an extended description of admiralty jurisdiction in new section 22 of the *Federal Court Act*. The *Admiralty Act,1934* had incorporated the admiralty subject matter description from the British enactment of 1925.[68] However, in 1956 the British enactment had been replaced following the ratification of the 1952 International Convention on the Arrest of Ships.[69] Canada continued with its legislative incorporation of the 1925 British enactment until the coming into force in 1971 of section 22 of the *Federal Court Act*, replacing the reference to section 22 of the 1925 British enactment.

New section 22 of the *Federal Court Act* has two subsections. Subsection 22(1) states that the Federal Court has been given "concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned."

Subsection 22(2) contains a list of maritime claims over which the Federal Court has jurisdiction. The introductory language of the subsection states that "[w]ithout limiting the generality of subsection (1), for greater certainty" the Federal Court has jurisdiction over the claims identified in subsection 22(2). Combined with subsection 22(1), this clearly indicates that the list is not exhaustive and jurisdiction can be exercised for any claim arising under Canadian maritime law.[70] The list of maritime claims in subsection 22(2) of the 1970 *Federal Court Act* is similar to,

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67 The new Act was adopted by the first Trudeau government and the definition of Canadian maritime law was said to have been drafted by the then chief justice of the Exchequer Court, Wilbur Jackett. See Richard W. Pound, *Chief Justice W.R. Jackett: By the Law of the Land* (Toronto: Osgoode Society Publications, 1999), at pages 213 *et seq*.

68 *Supreme Court of Judicature (Consolidation) Act, 1925* (U.K.), 15 & 16 Geo. V, c. 49, section 22 of which was incorporated in 1934 as a schedule to Canada's *Admiralty Act, 1934*.

69 *Administration of Justice Act, 1956* (U.K.), 4 & 5 Eliz. II, c. 46. The second schedule repealed section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925* (U.K.), 15 & 16 Geo. V, c. 49, although the section remained applicable in Canada as a schedule to the *Admiralty Act, 1934*.

70 That said, the list in subsection 22(2) is fairly complete, and new heads of jurisdiction under subsection 22(1) have not been legion.

but more expansive than, the list copied from the British 1925 enactment as appended to the *Admiralty Act,1934*.

However, in Canada, even before the enactment of the *Federal Court Act* in 1970, the Exchequer Court had been given some additional powers. These were not to be found in section 22 of the English enactment, and were therefore not in the schedule to the *Admiralty Act*[71]. Rather, they are found in subsection 18(3) of the *Admiralty Act*. That section includes reference to claims arising out of the use or hire of a ship,[72] or the carriage of goods in a ship[73] or a tort in respect of the carriage of such goods,[74] or for necessaries supplied to a ship,[75] all heads of jurisdiction similar, but not identical, to those listed in paragraphs 22(1)(vii) and (xii) of the English enactment of 1925, and thus in the schedule to the *Admiralty Act*.

But whereas the English enactment restricted such claims to ships that did not belong to English residents, subsection 18(3) of the Canadian *Admiralty Act* went slightly further, overriding the sections incorporated in the schedule. Thus, a claim for necessaries could be taken against any ship, Canadian or foreign, regardless of the residence of its owners. A claim regarding the use or hire of a ship, the carriage of goods in a ship or a tort in respect of the carriage of such goods could be taken *in personam* against the ship's owners, although not *in rem* against the ship itself, if any of the owners was domiciled in Canada.[76] Furthermore, unlike its English counterpart, the Canadian enactment allowed claims to be made for general average contributions.[77]

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71 *Admiralty Act*, R.S.C. 1970, c. A-1.

72 *Ibid*., s. 18(3)(*a*)(i). The heads of jurisdiction set out in s. 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925* (U.K.), 15 & 16 Geo. V, c. 49 include s. 22(1)(*a*)(xii)(1), which covers claims under agreements for the use and hire of foreign ships.

73 *Ibid*. s. 18(3)(*a*)(ii). See s. 22(1)(*a*)(xii)(2) of the *Supreme Court of Judicature (Consolidation) Act, 1925* referring to the carriage of goods in foreign ships.

74 *Ibid*., s. 18(3)(*a*)(iii). See s. 22(1)(*a*)(xii)(3) of the *Supreme Court of Judicature (Consolidation) Act, 1925* referring to torts concerning the carriage of goods in foreign ships.

75 *Ibid*. s. 18(3)(*b*). Under s. 22(1)(*a*)(vii) of the *Supreme Court of Judicature (Consolidation) Act, 1925*, the English admiralty courts again only had jurisdiction over necessaries supplied to foreign ships.

76 *Ibid.,* s. 18(4). See also s. 20(1)(*f*). This restriction was not retained in the 1970 enactment of the *Federal Court Act*.

77 *Ibid*. s. 18(3)(*c*). The English admiralty courts had lost general average jurisdiction in the seventeenth century. The case usually cited to support this loss is *Gold v. Goodwin* (1670), 2 Keble 678, 84 E.R. 427 (K.B.). However, the report of that case, concerning a foreign adjustment, is so scanty that is difficult to read into it such a momentous change. Since then, jurisdiction over general average claims has been re-introduced in British admiralty legislation. See the *Senior Courts Act 1981* (U.K.), c. 54, s. 20(2)(*q*).

Further heads of jurisdiction added in the 1970 *Federal Court Act* include claims for passenger baggage[78], although such claims would arguably be included in claims for loss of goods carried in a ship, for pilotage[79], for marine insurance[80] and for dock and harbour dues.[81] Interestingly, although admiralty jurisdiction in the United Kingdom has evolved since 1925[82], and now includes claims for pilotage,[83] dock and harbour dues,[84] baggage[85] and even general average,[86] the latest enactment of British admiralty jurisdiction still does not include jurisdiction over marine insurance, presumably as that is of the jurisdiction of the English Commercial Court. Further, the 1970 Canadian enactment retained admiralty jurisdiction over aircraft for salvage[87], and extended it to waterborne aircraft for towage and pilotage.[88]

Although some of the heads of jurisdiction in subsection 22(2) may be repetitive, it is clear from the 1970 *Federal Court Act*, through the definition of Canadian maritime law and the general wording of new subsection 22(1), that Canada's Parliament intended the new Federal Court to have as much maritime jurisdiction as possible. The definition of Canadian maritime law, and the general wording of subsection 22(1) determine the scope of admiralty jurisdiction the new court was to have.[89] There are several points to be noted concerning these important provisions.

First, the approach was not entirely new, as subsection 18(1) of the *Admiralty Act* stated that the Exchequer Court, sitting in admiralty, was to have jurisdiction over "the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in

78 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 22(2)(*h*).
79 *Ibid*., s. 22(2)(*l*).
80 *Ibid*. s. 22(2)(*r*). The Supreme Court of Canada upheld admiralty jurisdiction over marine insurance in *Triglav v. Terrasses Jewellers*, [1983] 1 S.C.R. 283.
81 *Ibid*. s. 22(2)(*s*).
82 See the *Senior Courts Act 1981* (U.K.), c. 54.
83 *Ibid.*, s. 20(2)(*l*).
84 *Ibid.*, s. 20(2)(*n*).
85 *Ibid*., s. 24 defines "goods" as including baggage.
86 *Ibid*., s. 20(2)(*q*).
87 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 22(2)(*j*). Section 18(5) of the former *Admiralty Act* extended salvage jurisdiction to aircraft "on or over" any Canadian waters. Presumably, the aircraft to be salvaged must rather be "on or in" waters.
88 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 22(2)(*k*) and (*l*). The British *Senior Courts Act 1981*, s. 20(2)(*j*), (*k*) and (*l*), also extends admiralty jurisdiction to aircraft for salvage, towage and pilotage.
89 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 22(1).

England".[90] Both of these statutes ensure that no jurisdiction of the English admiralty courts was to be lost.

But the *Federal Court Act* provisions went further. The definition of Canadian maritime law refers not only to the jurisdiction that the English admiralty courts had, but to the jurisdiction they would have had, had they had unlimited jurisdiction in relation to maritime and admiralty matters.[91] The English admiralty courts had long lost to the courts of common law much of their jurisdiction over maritime matters,[92] and the definition was an attempt to restructure admiralty jurisdiction as it might have been without the English struggle that lasted from the fifteenth to the seventeenth centuries.[93] Further, new subsection 22(1) included for good measure a reference to the Federal Court's jurisdiction over any subject coming within the class of subject of navigation and shipping, if not otherwise specially assigned. Canadian admiralty jurisdiction could hardly have been defined in a broader manner.

Further, the 1970 enactment extended admiralty jurisdiction to any maritime claim "whether arising on the high seas, in Canadian waters or elsewhere, and whether those waters are naturally navigable or artificially made so, including, without restricting the generality of the foregoing, in the case of salvage, claims in respect of cargo or wreck found on the shores of those waters".[94] Thus the claim may concern an event or a salvage having taken place in foreign waters or on foreign shores. Similarly, jurisdiction over a claim on a mortgage or charge does not depend on the country of registry of the mortgaged ship or even on whether the ship is registered, and extends to legal and equitable charges of any nature by way of security.[95]

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90 *Admiralty Act*, R.S.C. 1970, c. A-1, s. 18(1).

91 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 2.

92 For a full discussion of the struggle between the English admiralty and common law courts, see the introduction to *Hale and Fleetwood*, *supra*, note 41.

93 The admiralty courts and the common law courts disputed maritime claims from the enactment of the late fourteenth century English legislation of Richard II, (1389), 13 Ric. II, stat. 1, c. 5 and (1391), 15 Ric. II, c. 3, sometimes seen romantically as putting an end to the high tide of British admiralty jurisdiction, until the end of efforts to re-vitalize the court's jurisdiction with the failed attempt at enacting legislation in the 1670s, sometime seen as marking the court's lowest ebb. The High Court of Admiralty only finally regained power with the enactment under Victoria of the *Admiralty Court Act, 1840* (U.K.), 3 & 4 Vict., c. 65 and the *Admiralty Court Act, 1861* (U.K.), 24 & 25 Vict., c. 10. A third piece of legislation, tabled as Bill 28 in the House of Commons on February 18, 1867, would have extended the jurisdiction even further, but was never adopted.

94 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 22(3)(*c*).

95 *Ibid*., s. 22(3)(*d*).

Canada's enactment of the *Federal Court Act* in 1970 was, from a jurisdictional point of view, an attempt to create an admiralty court of the widest possible jurisdiction, limited only by the constitutional constraints of the *Constitution Act, 1867*.[96] The importance of marine activities at the time of Confederation is reflected by the fact that five out of 28 heads of legislative jurisdiction assigned to Parliament, including navigation and shipping, concerned maritime matters.[97] And a sixth covered the regulation of trade and commerce[98] which at the time had a distinctly marine flavour.

However, the restriction of federal authority in subsection 91(13) of the *Constitution Act, 1867* to inter-provincial and international ferries underscores the fact that the framers of the constitution also intended the provinces to have some jurisdiction over marine activities. Subsection 92(10) of the *Constitution Act, 1867* assigns legislative jurisdiction over local works and undertakings to the provinces, but expressly excludes inter-provincial and international shipping lines.[99]

Thus the intent is clearly that intra-provincial ferries, which still operate in eastern Canada, in Quebec and in British Columbia, and intra-provincial shipping lines, come under provincial legislation. Legislative jurisdiction over navigation, including collision avoidance rules, is solely federal. But what about shipping? Does jurisdiction over intra-provincial ferries carrying passengers and intra-provincial shipping lines carrying cargoes mean that shipping is not solely a federal head of jurisdiction?

The answer is perhaps not clear. Although the *Constitution Act, 1867*[100] does not assign labour relations to either provincial or federal governments, the Supreme Court has attributed to the provinces jurisdiction over labour union certification generally[101], as well as over labour

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96 *Constitution Act, 1867*, *supra*, note 55.

97 *Ibid*., ss. 91(9) beacons, buoys and lighthouses, (10) navigation and shipping, (11) quarantine and marine hospitals, (12) fisheries and (13) inter-provincial and international ferries.

98 *Ibid*., s. 91(2).

99 *Ibid*., s. 92(10)(*a*) and (*b*).

100 *Constitution Act, 1867*, *supra*, note 55.

101 Ever since the Privy Council decision in *Toronto Electric Commissioners v. Snider,* [1925] A.C. 396 (P.C.). Note however, that the following year, the Privy Council gave a very wide interpretation to the powers bestowed on Parliament under s. 91(10). See *Montreal v. Montreal Harbour Commissioners*, [1926] A.C. 299 (P.C.), at pages 312 and 313. See also *Agence Maritime v. C.C.R.O*., [1969] S.C.R. 851.

relations[102] and workers' compensation schemes,[103] specifically with regard to intra-provincial shipping and stevedoring companies.

In 1955, the Supreme Court determined that Parliament was entitled to regulate labour relations over a local stevedoring undertaking as it was an integral part of Parliament's competence over navigation and shipping, and the stevedores devoted virtually all of their time to federally-regulated shipping companies.[104] Thus the federal government has jurisdiction to regulate employment of local undertakings, either where it relates directly to a federally-regulated undertaking such as an inter-provincial shipping line or, as part of the government's derivative jurisdiction, where the employment is an integral part of a federally-regulated undertaking such as stevedores serving inter-provincial carriers.[105]

In 1969 however, the Supreme Court said that, with the exception of the rules of navigation, subsections 91(29) and 92(10) of the *Constitution Act, 1867*[106] remove intra-provincial shipping lines from the purview of Parliament.[107] The Supreme Court has never gone so far as to say that federal shipping legislation concerning such matters as liability and limitation of liability for cargo or passenger claims did not extend to such local enterprises, but in 2012 the Court said that subsection 91(10) did not confer *absolute* jurisdiction to regulate shipping, precisely because subsection 92(10) allows provinces to regulate transportation within their boundaries.[108]

But the power of navigation and shipping conferred by subsection 91(10) is not limited territorially, and it would appear that jurisdiction over local works or undertakings under subsection 92(10) would be limited to the creation, unionizing and operation of the undertaking itself, as opposed to the rules of navigation and shipping applicable to marine activities, and if

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102 *Agence Maritime v. C.C.R.O.*, [1969] S.C.R. 851.

103 *Tessier Ltée v. Québec (CSST)*, 2012 SCC 23, [2012] 2 S.C.R. 3.

104 *Reference re Industrial Relations and Dispute Investigation Act*, [1955] S.C.R. 529 at page 592 [hereinafter, *Stevedores Reference*]. See more recently, *Tessier Ltée v. Québec (CSST)*, 2012 SCC 23, [2012] 2 S.C.R. 3 at paragraphs 13, 14 and 16.

105 *Tessier Ltée v. Québec (CSST)*, 2012 SCC 23, [2012] 2 S.C.R. 3, at paragraph 17.

106 *Constitution Act, 1867*, s*upra*, note 55. Section 91(29) states that Parliament's authority extends to any subject expressly excepted in the subjects assigned exclusively to the provincial legislatures.

107 *Agence Maritime v. C.C.R.O.*, [1969] S.C.R. 851, at page 859.

108 *Tessier Ltée v. Québec (CSST)*, 2012 SCC 23, [2012] 2 S.C.R. 3, at paragraphs 24 and 25. See also *Marine Services International v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53.

the intent had been to have both federal and provincial shipping rules for liability for cargo and passenger claims, presumably more explicit language would have been used.[109]

The power of Canada's admiralty court, the Federal Court, to hear and determine maritime cases is directly related to the question of constitutional jurisdiction over shipping and navigation. The Federal Court is a statutory court created under section 101 of the *Constitution Act, 1867*[110] for the "better administration of the laws of Canada".[111] Those laws can only be laws validly adopted by Parliament. They can include judge-made laws if an enactment incorporates a body of law, such as was done by the enactment of the definition of Canadian maritime law.[112] But for all other jurisdiction, a statute of Canada is required. It is suggested that the power over navigation and shipping conferred on Parliament under section 91(10) is sufficient to include all admiralty jurisdiction, and although the extent of provincial legislative power over intra-provincial shipping lines remains to be finally determined by the Supreme Court, such legislation would not remove the exclusive federal jurisdiction over admiralty actions *in rem*.[113]

Maritime Liens and Statutory Rights *in rem*

Admiralty actions *in rem* are available in Canada today for claims listed in subsection 22(2) of the *Federal Courts Act*. This list, as has been seen, includes both contractual and delictual claims arising from the ownership, possession, use and hire of a ship or a portion of a ship. But there is a fundamental difference between a maritime claim giving rise to a maritime lien and a maritime claim that does not. A maritime lien is peculiar to courts of admiralty and constitutes a charge on maritime property, usually ships, that is similar to the notion of a privileged claim of the civil

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109 As a pre-confederative province, Quebec has retained its legislation concerning shipping in the *Civil Code of Quebec*, S.Q. 1991, c. 64, CQLR, c. C-25.01, arts. 2059 *et seq*. It is however, unclear whether and to what extent such legislation is applicable today. See *Triglav v. Terrasses Jewellers*, [1983] 1 S.C.R. 283, at page 289.

110 *Constitution Act, 1867*, s*upra*, note 55.

111 Section 101 of the Constitution was first employed by Parliament in 1875 with the creation of the Supreme Court, a general court of appeal for all of Canada, and the Exchequer Court, eventually to be assigned admiralty jurisdiction and to become the Federal Court. See the *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

112 *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 2.

113 The rules of procedure of the provincial Supreme Court of British Columbia include rule 55, purporting to confer *in rem* jurisdiction on that court. However, it is doubtful whether the provincial courts can receive traditional *in rem* jurisdiction from the provincial legislatures. The provinces can create procedural remedies and attribute to them the names they chose. In Quebec, the *Code of Civil Procedure*, S.Q. 2014, c. 1, CQLR, c. 25-01, arts. 516 *et seq*., includes the remedy of the seizure before judgment. But these remedies do not allow an action to proceed against a thing alone, and cannot lead to a true admiralty court sale, conferring title free and clear of all prior claims, and in that sense are not true actions *in rem*.

law.[114] Maritime liens arise by operation of law, both in certain contractual claims, for services rendered to the ship, or in certain delictual claims, for damage caused by the ship.

Such claims may be prosecuted by an admiralty action *in rem* against the ship, cargo or freight that is the subject of the action. However, whereas all maritime liens include the right to proceed *in rem* against the ship or property which is the object of the lien, and regardless of whether the property has since changed owners, in the case of a maritime claim that does not give rise to a maritime lien, there are certain conditions precedent to being able to issue *in rem* process.

The claims that do not give rise to maritime liens are said to give rise to statutory rights *in rem*. The term is perhaps not the best, as true maritime liens can also be created by statute. But when they are created by statute, there is no ambiguity as to whether the right is a maritime lien or not. As mentioned above, the Privy Council in *The Bold Buccleugh* struggled with the question whether each statutory extension of admiralty jurisdiction in the *Admiralty Court Act, 1840*[115] gave rise to a maritime lien. They concluded that it did, but that was *obiter*, and has since been proven wrong.

Prior to the 1840 legislation, admiralty jurisdiction was judge-made. The admiralty courts applied civil law principles to maritime claims. The common law courts were successful in restricting the scope of admiralty jurisdiction to events arising at sea and, just prior to the 1840 legislation, the civil jurisdiction of the admiralty was essentially reduced to wage, damage and salvage claims, as well as to claims for bottomry and disputes for the possession of ships between part owners. Each of these claims gave rise to what the Privy Council in *The Bold Buccleugh* termed a maritime lien, even though that term was never a term of art in the admiralty courts.

Parliament can create additional maritime liens if it so desires. Examples of maritime liens created by Britain's Parliament since 1840 include a lien for the master's wages[116], and in Canada, Parliament has created liens for port and harbour dues and damage caused to port

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114 See Price, *supra*, note 22, at pages 1 *et seq*., and Thomas, *supra*, note 25, at pages 10 *et seq*.

115 *Admiralty Court Act, 1840* (U.K.), 3 & 4 Vict., c. 65

116 See the *Merchant Shipping Act 1995* (U.K.), c. 21, s. 41. This is the latest version of this lien first granted by the *Merchant Seamen's Act, 1844* (U.K.), 7 & 8 Vict., c. 112, s. 6 and then by the *Merchant Shipping Act, 1854* (U.K.), 17 & 18 Vict., c. 104, s. 191.

installations[117] and, more recently, even liens for the supply of necessaries.[118] All of these liens, like traditional maritime liens, may be enforced by an admiralty action *in rem* against the object of the lien, usually the ship giving rise to the cause of action.

However, an event that would normally give rise to a maritime lien may not always do so. In certain circumstances, the courts have determined that the creation of a maritime lien will require the *in personam* liability of the shipowner, whereas other maritime liens do not. And, where required, the *in personam* liability is that of the owner at the time the maritime lien arises, as perfected maritime liens allow *in rem* actions to follow the ship into the hands of any subsequent purchaser, whether or not he has received notice of the claim and, in that sense, do not require the *in personam* liability of the owner at the time the action is commenced.

The principal example of a maritime lien that requires the shipowner's *in personam* liability is that of collisions between vessels. Generally stated, where a ship, by the fault of those in charge of her navigation, causes damage to another ship, the latter benefits from a maritime lien on the wrongdoing ship. The liability of the owner of the ship at fault is an extension of the principle of vicarious liability of the employer for the acts of his employees. That the owner will not be on board the ship at the time of the collision is easily understood. However, his employees, the master and crew, are undoubtedly exercising their navigational duties when they cause the accident to happen. Thus the maritime lien in a collision case is said to require the *in personam* liability of the shipowner.

But what then is the case when the ship is under charter? There are several kinds of ship charters, including charters based on time, whereby the charterer pays a daily rate of hire to have the ship do whatever the charterer wishes, and voyage charters, whereby the ship charges freight, usually per ton of cargo shipped, to proceed from one agreed place to another. But in each of these cases, those in charge of the ship remain the employees of the shipowner and thus engage his liability for navigational errors.

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[117] See the *Canada Marine Act*, S.C. 1998, c. 10, s. 122(1).

[118] See the *Marine Liability Act*, S.C. 2001, c. 6, as amended by S.C. 2009, c. 21, s. 12, adding new section 139 to the *Marine Liability Act*.

A third kind of charter, called a charter by demise or bareboat charter,[119] often used as a means of financing the purchase of a ship at the end of the charter, vests full possession of the ship in the charterer's hands, requiring the charterer to engage the crew and treat the ship as if it were his own. In such cases, the true shipowner does not employ the navigators, and cannot be vicariously liable for their negligent navigation. And yet the courts have found that a lien arises, even though no vicarious liability can be placed upon the shipowner without a link to the negligent act of navigation. The reasoning is that the shipowner voluntarily entrusts the vessel to the demise or bareboat charterer, and thus the vessel remains subject to a maritime lien for collision damages. Thus in *The Lemington*, Sir Robert Phillimore could not see how the owners of a ship causing a collision could avoid the maritime lien by temporarily transferring possession to the demise charterer.[120]

But there are instances where the shipowner could not be said to have voluntarily entrusted possession in the hands of the employer of the negligent navigators. Thus in cases of the requisitioning of a ship for military purposes, the negligent navigation of the ship by military personnel has been compared to negligent navigation by pirates having taken over a ship without the owner's consent and thus no lien arises.[121] Similarly, where a ship that had sunk in a harbour was insufficiently lit by the harbour authority, the Privy Council found no lien to have arisen.[122] And where no maritime lien arises due to the absence of *in personam* liability on the part of the shipowner, no action *in rem* is available.

In a Canadian case concerning collision damage caused by drifting unmanned barges, the Supreme Court held that the owners of the barge *AT & B No. 28* were liable *in personam* and that a maritime lien and action *in rem* arose, even though the barge was bareboat-chartered and the drifting unexplained, but that the owners of the barge *ESM No. X* were not, as that barge had been unmoored and allowed to drift by a third-party tug operator hired to tow the barge. Thus the fault of the towing company, which was not a party to the *in rem* action, was solely to blame for

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119 The two terms are usually used interchangeably in this enquiry.

120 *The Lemington* (1874), 2 Asp. M.L.C. 475 (Adm.), at page 478.

121 In *The Sylvan Arrow*, [1923] P. 220 (Adm), Hill, J. cites *The Lemington*, *ibid*., as justification for this limit on the liability of the owners. An earlier motion in *The Sylvan Arrow* is reported at (1922), 16 Asp. M.L.C. 115 (Adm.).

122 *The Utopia*, [1893] A.C. 492 (P.C.).

the damage caused by the barge *ESM No. X* and no maritime lien having arisen, no action *in rem* against that barge would be possible.[123]

Maritime liens for collision damages are not the sole maritime liens requiring the *in personam* liability of the shipowner. The lien for the master's disbursements is limited to those disbursements that are authorized by the owner and, in consequence, a presumption of that authority applies to disbursements occurring in the ordinary course of the ship's employment.[124]

However, maritime liens for wages and bottomry bonds do not require the *in personam* liability of the shipowner. The reason for the latter rule is simply that a bottomry bond, usually entered into by the ship's master in a foreign port at a time when communication with the shipowner would be virtually impossible, is an advance made on the credit of the ship, not the owner.[125] With regard to wages of the crew and, once given a lien for wages by statute, of the master, the absence of the requirement of personal liability on the part of the shipowner has been termed a matter of public policy,[126] and it is fairly easy to understand the source of such a policy to be the uneven positions of a shipowner and a crew member.

Similarly, a maritime lien for salvage does not require the personal liability of the owner and even where the salved ship had been requisitioned, the courts have held that the salvor is not a replacement crew but rather a third party who renders a service to the benefit of the owner.[127] It is on the basis of this benefit that the lien can arise even without the liability of the owner.

But these considerations of the personal liability of the shipowner are only of interest in determining whether a lien arises. Once perfected, the maritime lien can always be enforced by an action *in rem*. But what is the case with statutory rights *in rem*?

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123 *Goodwin Johnson Ltd. v. The Ship (Scow) AT & B No. 28*, [1954] S.C.R. 513. The concept of *in personam* liability as a condition precedent to *in rem* liability has, however, not been revisited since the enactment of the *Federal Court Act* in 1970. The Act makes no mention of maritime liens, but requires no prerequisite personal liability for an *in rem* action involving any head of claim giving rise to a maritime lien.

124 See *The Castlegate*, [1893] A.C. 38 (H.L.) and *The Ripon City*, [1897] P. 226 (Adm.).

125 *Stainbank v. Shepard* (1853), 13 C.B. 418, 138 E.R. 1262 (C.P.).

126 *The Castlegate*, [1893] A.C. 38, at page 52. Lord Watson argued that this was an exception to the rule that every claim *in rem* was against the owner of the ship.

127 *The Meandros*, [1925] P. 61 (Adm.).

Statutory rights *in rem* is not a term of art, but is used by some authors to differentiate between admiralty actions *in rem* that arise from maritime liens and those that do not.[128] The latest British enactment of admiralty jurisdiction states that an *in rem* action may be taken wherever there is a maritime lien on the ship or property to be arrested.[129] But the legislation also states that an *in rem* action may be taken for other heads of claim, whether or not a maritime lien arises. From this, it is clear that a statutory right *in rem* may result from a claim for damages independently of maritime liens.[130]

The same situation exists in Canada. Even though the *Federal Courts Act* makes no mention of maritime liens, actions *in rem* are doubtlessly available to enforce maritime liens, whether under the general admiralty power of subsection 22(1) or under the enumeration of claims in subsection 22(2). But where no maritime lien arises due to the absence of *in personam* liability, such as in the 1954 Supreme Court decision concerning the barge *ESM No. X*, it is unclear whether the language of the Act will allow any *in rem* action to stand.

Statutory rights *in rem* were first introduced in the 1840 and 1861 statutory extensions of British admiralty jurisdiction, which brought new heads of jurisdiction, all of which are now known not to create maritime liens. Where statutory extensions of jurisdiction do not expressly create maritime liens, the resulting remedy is a statutory right *in rem*. However, although all heads of claim permit actions *in personam* to be taken, there are conditions precedent to exercising statutory rights *in rem*.

This is an important distinction between maritime liens and statutory rights *in rem*. A maritime lien is a civil law privilege, and arises as the event takes place, whereas a statutory right *in rem* only arises as the action is commenced. A maritime lien is not defeated by the sale of the property to be arrested, whereas a statutory right *in rem* is only valid if the suit is commenced prior to any sale of the property to be arrested. Although the creation of certain maritime liens may require the personal liability of the shipowner, once created, no evidence of liability of the

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128 Other terms include statutory lien or statutory lien in admiralty. See for example, D.C. Jackson, *Enforcement of Maritime Claims*, 3rd ed. (London: LLP, 2000), at page 451.

129 *Senior Courts Act 1981* (U.K.), c. 54, s. 21(3).

130 *Ibid*., s. 21(4)(*b*).

original owner or of any new owner need be invoked. A statutory right *in rem* requires proof of the continuing liability of the owner of the property at the time the action is issued.

Finally, and perhaps most importantly, a maritime lien gives the holder a priority to be paid out of the proceeds of sale of the defendant ship before any mortgagee, whereas a statutory right *in rem*, even if enforced through the judicial sale of the ship, will not prevent a mortgagee from taking payment from the proceeds of sale in priority to the statutory right *in rem* claimant.

In the United Kingdom, the restrictions on the exercise of statutory rights *in rem* are found in subsection 21(2) of the *Senior Courts Act 1981*. That subsection states that for claims concerning the ownership, possession[131] or employment[132] of a ship, or a mortgage or charge on the ship,[133] or for forfeiture of condemnation of a ship or for droits of admiralty,[134] an action *in rem* may be taken. For statutory rights not mentioned in subsection 21(2) of the *Senior Courts Act 1981*, subsection 21(4) sets out the prerequisites for an action *in rem*. It must first be demonstrated that the person liable *in personam* was the owner, charterer or in possession or control of the ship when the cause of action arose, and that that person is, at the time when the action is commenced, the beneficial owner or demise charterer of the ship. Thus in the United Kingdom, a statutory right *in rem* can only be taken where the beneficial owner or demise charterer was liable *in personam* when the cause of action arose, and remains so at the time of commencement of the action.

In Canada, section 43 of the *Federal Courts Act* sets out similar but not identical restrictions. That section commences by affirming that all jurisdiction given to the court in section 22 may be exercised *in personam* or *in rem*. However, subsection 43(3) provides that, for certain heads of claim set out in subsection 22(2), *in rem* actions are not available "unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose".[135] The concept of beneficial ownership is not defined in the legislation of either

131 *Senior Courts Act 1981*, s. 20(2)(*a*).
132 *Ibid*., s. 20(2)(*b*).
133 *Ibid*., s. 20(2)(*c*).
134 *Ibid*., s. 20(2)(*s*).
135 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 43(3).

country, but the *Canada Business Corporations Act* defines beneficial ownership as including ownership through any trustee, legal representative, agent or mandatary, or other intermediary.[136]

Thus, subsection 43(3) excludes *in rem* actions for the heads of claim to which the subsection applies, where title to the property has been transferred between the arising of the cause of action and the commencement of the action *in rem*. This could be said to apply in the United Kingdom as well, although, unlike in Canada, the beneficial owner at the time the action is commenced under the British enactment need not have been more than a charterer or in possession of the ship at the time the cause of action arose.

An action *in rem* in Canada usually commences with the issuing of a warrant of arrest of the property that is the subject of the action. But the requirement that title has not been transferred has been interpreted by the courts in Canada as requiring the continuing *in personam* liability of the owner of the property, a condition explicitly set out in the British enactment.[137] Otherwise, the retention of title by the owner who held title at the time the cause of action arose would not be required. Consequently, where subsection 43(3) applies, an action *in rem* may only be commenced where the property to be arrested has not been transferred, and where the beneficial owner of the property remains liable *in personam*.

Subsection 43(3) thus removes the right to issue a warrant for the arrest of a ship or other property where the beneficial owner thereof is not liable *in personam* or where the title thereto has been transferred. This applies to several heads of claim in subsection 22(2) of the Canadian enactment. Those heads include some that are not considered to be of admiralty jurisdiction in the United Kingdom. For example, paragraph 22(2)(*f*) confers on the Federal Court jurisdiction over through or multi-modal bills of lading where carriage on board ship is included, regardless of during what stage of the transit the incident arises. Further, paragraph 22(2)(*r*) confers jurisdiction over claims arising out of a contract of marine insurance. The English admiralty courts once had this jurisdiction, but it was lost through prohibitions from the courts of common

136 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 2.
137 *The Jensen Star*, [1990] 1 F.C. 199 (C.A.).

law.[138] In Canada the Supreme Court has recognized that marine insurance is part and parcel of maritime law and Parliament subsequently enacted marine insurance legislation.[139]

However, unlike subsection 21(4) of the British enactment, subsection 43(3) of the *Federal Courts Act* does not apply to all statutory rights *in rem*. Neither enactment prevents *in rem* actions from being taken against ships for disputes concerning their ownership, possession, employment or mortgaging, but the restrictions in Canada's subsection 43(3) do not apply to claims for pilotage,[140] for general average contributions,[141] or for dock or harbour dues.[142] None of these claims gives rise to a maritime lien unless specifically granted by Parliament.[143] But a statutory right *in rem* for these claims does not fall under subsection 43(3), and thus does not require proof of the *in personam* liability of the owner, nor of continuity of title. Some authors call these claims "quasi-maritime liens" in that they follow the ship as do traditional maritime liens, but do not have the ranking of a maritime lien against the proceeds of an admiralty sale.[144]

Perhaps the main difference between subsections 21(4) in the United Kingdom and 43(3) in Canada lies in the fact that the British enactment accepts a demise charter as a sufficient link to the ship to trigger a statutory right *in rem*. This is not the case in Canada, where the courts have decided that demise or bareboat charters are insufficient to support a statutory right *in rem*.[145]

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138 Marsden refers to several marine insurance cases, the first of which in the Admiralty registers would appear to be the 1550 case *Cavalicant v. Maynard*, referred to in *Select Pleas I*, *supra*, note 41, at page lxxiii and reported in *Select Pleas II*, *supra*, note 41, at page 45. But earlier insurance claims were made in the High Court of Admiralty. See *Select Pleas II* at pages xv- xvi and 45-59.

139 *Triglav v. Terrasses Jewellers*, [1983] 1 S.C.R. 283 led to the adoption of the *Marine Insurance Act*, S.C. 1993, c. 22. The Act is virtually identical to the British enactment of 1906.

140 *Federal Courts Act*, s. 22(2)(*l*).

141 *Ibid*., s. 22(2)(*q*).

142 *Ibid*., s. 22(2)(*s*).

143 See, for example the *Canada Marine Act*, S.C. 1998, c. 10, s. 122, where Parliament grants federal port authorities a maritime lien on ships and, in certain cases cargoes, for port fees as well as for damage caused to port property by the ship. With regard to pilotage, a decision of the Federal Court in *Osborne Refrigeration v. The Atlantean I*, [1979] 2 F.C. 661 (T.D.), at pages 672 *et seq*., purports to recognize a maritime lien for pilotage services. The case was upheld by the Federal Court of Appeal, published at (1982), 52 N.R. 10, but no discussion of the *de minimus* claim of pilotage was entertained in the appeal decision, and the case has been seen to be a discretionary order of priorities following the sale of a ship, and not a definitive recognition of maritime liens for pilot services. See William Tetley, *Maritime Liens and Claims*, 2nd ed. (Montreal: Blais, 1998), at page 463. Pilotage services are not subject to subsection 43(3), but their priority is a matter of ranking.

144 Tetley, *ibid*, at page 457.

145 *The Jensen Star*, [1990] 1 F.C. 199, at page 210 *per* Marceau, J.A. In an earlier Federal Court case, *Thorne Riddell v. Nicolle N Enterprises*, [1985] 2 F.C. 31, Addy, J. of the Trial Division had held the contrary, in *obiter*.

The difference arose from the ratification by the United Kingdom of an international convention on the arrest of ships which Canada has not adopted.

International Conventions on Arrest and Maritime Liens

At the international level, there have been several attempts to harmonize admiralty jurisdiction as concerns the arrest of vessels[146] and the creation of maritime liens[147]. The arrest conventions and maritime lien conventions have had effect on the courts of the countries that have ratified one or the other, including the United Kingdom which ratified the 1952 Arrest Convention[148] and amended its admiralty jurisdiction accordingly,[149] even though for 15 years after the changes, Canada continued to apply the earlier 1925 consolidation of British admiralty jurisdiction.[150] A more recent version of the arrest convention has come into force internationally, as has the most recent version of the lien convention, although neither has been adopted in the United Kingdom or in Canada.[151]

The arrest provisions of the British *Administration of Justice Act, 1956*, now consolidated in subsection 21(4) of the *Senior Courts Act 1981*, reflect the 1952 Arrest Convention. The 1999 Arrest Convention is to the same effect and uses terms based on the 1956 British enactment of the 1952 Arrest Convention. The 1999 version starts by defining maritime claims, generally along the lines of the 1970 Canadian enactment of the *Federal Court Act*,[152] but permits no other claim to give rise to an arrest.[153] The 1999 Arrest Convention refers to dock, canal and harbour

146 The International Convention Relating to the Arrest of Seagoing Ships, 1952, 439 U.N.T.S. 193 [hereinafter 1952 Arrest Convention] came into force in 1956 and the International Convention on the Arrest of Ships, 1999, 2797 U.N.T.S. 3 [hereinafter 1999 Arrest Convention] came into force in 2011.

147 The International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1926, 120 L.N.T.S. 187 [hereinafter 1926 Liens Convention] came into force in 1931, and although a convention of a similar nature adopted in 1967 never came into force internationally, a more modern version called the International Convention on Maritime Liens and Mortgages, 1993, 2276 U.N.T.S. 39 [hereinafter 1993 Liens Convention] came into force in 2004.

148 The 1952 Arrest Convention was ratified by the United Kingdom in March 1959.

149 *Administration of Justice Act, 1956* (U.K.), 4 & 5 Eliz. II, c. 46. The Act came into force on July 16, 1956 even though the United Kingdom only ratified the 1952 Arrest Convention in March 1959. See the *Administration of Justice Act (Commencement) Order, 1956* (U.K.), SI 1956/1065.

150 *Admiralty Act*, R.S.C. 1970, c. A-1.

151 *Supra*, notes 146 and 147.

152 *Federal Court Act*, S.C. 1970-71-72, c. 1. It is not a coincidence that the Canadian enactment contained language similar to the 1952 Arrest Convention and the 1956 British enactment thereof. Both of these models were at hand at the time of the drafting of the *Federal Court Act*.

153 See article 2.2 of the 1999 Arrest Convention, *supra*, note 146. This is one reason why countries like Canada have not adopted the convention.

dues,[154] as does the Canadian enactment, and to the collection of marine insurance premiums,[155] although it stops short of stating that any claim arising out of a policy of marine insurance will be a maritime claim.

The 1999 Arrest Convention is however more recent than Canada's 1970 enactment, and thus refers to claims for damage to the environment[156], for wreck removal[157] and for ship sale disputes[158], although Canada's Federal Court has recognized its jurisdiction over all three areas.[159] The 1999 convention drops the reference in previous conventions to bottomry[160], doubtlessly reflecting the rarity of such instruments in the modern world, but were such a bond to be issued, it would clearly be of admiralty jurisdiction and is expressly mentioned in subsection 22(2) of the *Federal Courts Act*.[161]

With regard to demise charters, both arrest conventions state that arrest is possible for ships on demise charter. In the most recent version, arrest is possible where the person who owned the ship at the time the cause of action arose is liable *in personam*, and is the owner of the ship at the time the arrest is effected. This is not exactly reflected in the British legislation, where the reference is to the time the action is brought, and not at the time of arrest, which might be later than the time the action is commenced. However, the conventions also state that arrest is possible where the demise charterer at the time the cause of action arose is liable *in personam*, and is either demise charterer or owner when arrest is effected.[162] Again the *Senior Courts Act 1981*

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154 1999 Arrest Convention, art. 1(n).

155 *Ibid*. art. 1(q).

156 *Ibid*. art. 1(d).

157 *Ibid*. art 1(e). The Nairobi International Convention on the Removal of Wrecks, 2007 has been adopted by the International Maritime Organization since the 1999 Arrest Convention, and has been adopted in Canada by the *Wrecked, Abandoned or Hazardous Vessels Act*, S.C. 2019, c. 1.

158 *Ibid*. art. 1(v).

159 The Federal Court has been given jurisdiction in environmental matters by legislation such as the *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, ss. 269 *et seq*. Canada has undertaken to ratify the Nairobi International Convention on the Removal of Wrecks, 2007 adopted by the International Maritime Organization on May 18, 2007, which will confer legislative jurisdiction on the Federal Court through amendments to the *Canada Shipping Act, 2001*, S.C. 2001, c. 26. See *supra*, note 157. The Federal Court has sold many ships as part of its *in rem* jurisdiction and has recognized its power to adjudicate ship sales and the conditions of sale.

160 1952 Arrest Convention, *supra*, note 146, art. 1(h). See also the *Administration of Justice Act, 1956*, *supra*, note 149, s. 20(2)(*r*).

161 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 22(2)(*c*).

162 1999 Arrest Convention, art. 3(1)(b).

refers to the time the action is brought. Canada's enactment does not recognize the standing of a demise charterer.

The arrest conventions also provide for sister-ship arrest, i.e. the arrest of a ship other than that which caused the damage complained of. To be arrested, the other ship must be owned, at the time arrest is effected, by the person who was the owner, or the demise, time or voyage charterer of the wrongdoing ship at the time the cause of action arose.[163] The *Senior Courts Act 1981* incorporates the concept of owner or charterer at the time the cause of action arose, but requires that person to be the beneficial owner of the sister ship at the time the action is commenced.[164]

Canada allows for sister-ship arrest, but not where charterers are involved. The Canadian enactment requires the person liable at the time the cause of action arose, to be the beneficial owner at the time the action is commenced.[165] This applies both to claims giving rise to maritime liens and to statutory rights *in rem*, and allows the arrest of a sister-ship as long as the owner of the ship to be arrested is the same as the owner of the original ship.

However, the lien itself and its priority will only attach to the wrongdoing ship. Nor does it remove the requirements for a statutory right *in rem*, and thus, for claims that give rise to statutory rights *in rem* falling subject to subsection 43(3), the owner of the wrongdoing ship at the time the cause of action arose, must be the beneficial owner of the sister-ship to be arrested at the time of the commencement of the action. The British legislation states that several ships may be named in the action but only one ship may be arrested.[166] The same rule applies in Canada even though the *Federal Courts Act* is silent on the point.[167]

The liens and mortgages conventions complement the arrest conventions. The arrest conventions allow for arrest to take place in a dispute involving marine mortgages[168] and maritime liens[169] but do not create mortgages or maritime liens. These are either created by national maritime law or by the liens and mortgages conventions. The liens and mortgages conventions do not create

163 *Ibid*., art. 3(2).
164 *Senior Courts Act 1981* (U.K.), c. 54, s. 21(4)(*b*)(ii).
165 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 43(8).
166 *Senior Courts Act 1981* (U.K.), c. 54, s. 21(8).
167 See *Westshore Terminals Ltd. v. Leo Ocean S.A*., 2014 FC 136, aff'd 2014 FCA 231.
168 1999 Arrest Convention, art. 1(u).
169 *Ibid*., art. 3(1)(e).

marine mortgages, but rather refer to their creation and ranking under the national maritime law of the state where the mortgage is registered.[170] However, the liens and mortgages conventions do create maritime liens for traditional British lien claim categories including wage claims, personal injury or damage claims rising from the operation of a vessel and salvage claims.[171]

The British maritime lien for bottomry and respondentia was recognized in the 1926 Liens Convention[172] but has since disappeared from the conventions as the issuing of such instruments has become redundant with modern communications. However, in the more recent conventions, new liens have appeared for port and canal dues and pilotage dues.[173] Neither of these gave rise to a traditional maritime lien and, although both appear in Canada's *Federal Courts Act*,[174] they can only give rise to maritime liens in Canadian maritime law or in British maritime law if granted by Parliament, as neither country has ratified one of the liens and mortgages conventions.[175]

The 1999 Arrest Convention thus widens incrementally the traditional jurisdiction of admiralty courts but, perhaps more to the point for present purposes, the arrest conventions, like the British enactment of the 1952 version thereof, and the Canadian enactment of the *Admiralty Act* and the 1970 *Federal Court Act*, all contain provisions concerning *in rem* and *in personam* jurisdiction. These international instruments bring British admiralty procedure for international claims to any ratifying state.

But the geographical application of admiralty procedure has evolved over time. In England, ships could not be arrested in their home port for the supply of necessaries. In Canada, the *Admiralty Act* allowed for such proceedings to be commenced *in rem* or *in personam*.[176] However, certain other restrictions applied. As was the case for English shipowners, no action *in rem* could be initiated in Canada's Exchequer Court on a claim for the use or hire of a ship, or relating to the

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170 See the 1993 Liens Convention, *supra*, note 147, art. 2.
171 *Ibid*., art 4. See the 1926 Liens Convention, *supra*, note 147, art. 4.
172 1926 Liens Convention, art 2(5).
173 1993 Liens Convention, art. 4(1)(d).
174 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 22(2)(*l*) and (*s*).
175 In Canada, the *Canada Marine Act*, S.C. 1998, c. 10, s. 122, grants a maritime lien to federal port authorities for port fees as well as for damage caused to port property by the ship. As concerns pilotage, see *supra*, note 143.
176 *Admiralty Act*, R.S.C. 1970, c. A-1, s. 19(2).

carriage of goods, if any of its owners were Canadian residents.[177] Further, issuing an action *in rem* required that either the ship or property which was the subject of the action be present in the district or registered in the district or owned or managed by residents of the district.[178] *In personam* claims for breach of contract required that the breach take place within the district or that performance was to have been within the district.[179] *In personam* claims in tort with respect to the carriage of goods were allowed only where the goods were carried into a port within the district.[180]

None of these restrictions were retained in the 1970 *Federal Court Act*. The concept of district which, in the *Admiralty Act*, was designated to be each maritime or Great Lake province[181] was simply discarded, and the Federal Court was given admiralty jurisdiction over any admiralty claim in Canada, regardless of the flag state of a ship, the country of registration of an aircraft or the residence of an owner.[182] In this manner, a suit involving a maritime dispute may be filed in any Federal Court registry in Canada.[183] However, the arrest of property still requires that property to be in Canada.

Warrants and Caveats

An arrest warrant in modern Canadian practice is simply an order addressed to a sheriff or bailiff empowering the arrest of designated property. Warrants in actions *in rem* can be issued by court officers, without the necessity of appearance before a judge, at any time after the filing of a statement of claim, upon receiving an affidavit to lead warrant. The affidavit sets out the nature of the claim and of the property to be arrested.[184]

Service of *in rem* process is an ancient affair. The warrant of arrest, affidavit to lead warrant and statement of claim are to be affixed to the mast or other prominent part of the vessel, or to the *res*

177 *Ibid*., s. 18(4). See the text accompanying note 76 above.
178 *Ibid*., s. 20(1)(*a*), (*b*) and (*c*).
179 *Ibid*., s. 20(1)(*e*).
180 *Ibid*., s. 20(1)(*f*). Presumably this restriction would not prevent an *in personam* claim where the tort resulted in the loss of cargo destined for a port within the district. But at any rate, upon the arrival of the ship without the lost cargo, an *in rem* claim would be possible under s. 20(1)(*a*).
181 *Ibid*., s. 12.
182 *Federal Court Act*, S.C. 1970-71-72, c. 1, ss. 22(3)(*a*) and (*b*).
183 There have even been cases where claimants in eastern Canada choose to file electronically in British Columbia in order to take advantage of the time zone differences when a local registry may be closed.
184 *Federal Courts Rules*, SOR 98/106, rule 481.

being arrested.[185] In former times, the method was nailing the warrant to the main mast but, even though ships still have masts today, albeit made of steel, modern usage, at least in Canada, is to tape or staple a copy of the warrant and claim to the wheelhouse door or other conspicuous part of the vessel and to leave another copy with the master. But only handing a copy to the master is not *in rem* service.[186] The modern practice of obtaining the consent of the solicitors acting for the owners of the *res* in lieu of service, meets the requirements of the rules of service of process, and is judicially accepted as *in rem* service. If the solicitor thereafter fails to appear or defend the *res*, it would be possible to sell the *res* and proceed without further service *in rem*.

In Canada, service does not vest the possession of the property arrested in the sheriff or bailiff, unless the Federal Court orders otherwise.[187] But the arrested property is not to be moved without the consent of all parties or the order of the Federal Court.[188] As a rule, the property will be released from arrest either by consent or by order of the court. In exchange, bail will be requested, either in a form acceptable to the court or to the arresting party.[189] The arresting party will often accept a bank or insurance company letter of undertaking, agreeing to accept service on behalf of the defendant interests and to pay the amount of any final judgment up to the limit of the amount of the letter of undertaking.

Should security not be forthcoming, or should the perishable nature of the property render it necessary, admiralty courts have the right to sell the property arrested. In Canada, the Federal Court has vast jurisdiction as to the appraisal and sale, whether by public auction or by private sale.[190] Property sold by an admiralty court is sold free and clear of any prior claims, and even of any maritime liens that may have burdened the property.[191] The principle behind this is that all claimants will maintain their standing with regard to the fund created and brought before the court as proceeds of sale. Thus the proceeds of sale become the *res* as concerns all prior rights

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185 *Ibid*., rule 479.

186 On this arcane point, see *The Prins Bernhard*, [1964] P. 117 at page 131 (Adm.), citing Sir Robert Phillimore in *The Marie Constance* (1877), 3 Asp. M.L.C. 505 at page 506 (Adm.). In Canada, there is at least one case where personal service on the master was deemed *nunc pro tunc* to be *in rem* service, although the ruling is doubtful. See *The Ralph Misener* (1997), 125 F.T.R. 209 (F.C.) reversing a decision of a Federal Court Prothonotary, *The Ralph Misener* (1996), 115 F.T.R. 284.

187 *Federal Courts Rules*, SOR 98/106, rule 483.

188 *Ibid*., rule 484.

189 *Ibid*., rule 486.

190 *Ibid*., rule 490.

191 *Ibid*., rule 490(3).

against the ship. A subsequent action *in personam* against the shipowner for any portion of a claim unsatisfied by the claimant's portion of the proceeds of sale can continue. However, such actions are rare, especially in a world where one-ship companies are common and where the ship is the only tangible asset the *in personam* shipowning company may hold.

Admiralty courts and their rules of practice often also provide for caveats to be entered, either to prevent a ship or other property from being arrested or from being released, or to prevent the proceeds of sale from being distributed.[192] A caveat is intended to reduce the number of arrests which may arise against a ship or other property. Thus, where a shipowner apprehends multiple arrests of his ship, he may file a caveat warrant, undertaking to file security against any claim made against the ship. Where a ship is already under arrest, any subsequent claimant can file a caveat release, undertaking to arrest the ship should the existing arrest be released. A claimant against a fund created by the sale of the ship may file a caveat payment to avoid immediate payment out of the proceeds, and to indicate to the court that he too has a claim against the fund. None of these caveats prevents further arrests or other proceedings from being filed, but where such proceedings are unnecessarily taken, the court can punish subsequent claimants with costs orders. As shall be seen, today's rules for caveats date from the mid-nineteenth century.[193]

Admiralty procedure is thus today well established in the United Kingdom and in Canada. Any action in admiralty may be taken *in personam*, and actions *in rem* may be taken based on a maritime lien or on a statutory right *in rem*. International maritime conventions have extended similar remedies to countries where *in rem* actions had not previously existed. But the modern practice of admiralty courts begs the question as to the origin of these remedies and especially of the admiralty action *in rem*. The lawyers practising in the admiralty courts in England were civilians trained in Roman and civil law. It is thus proposed to commence by looking at Roman law and the civil law that developed in Europe and in England as part of maritime law, in order to verify the origins of the admiralty action *in rem*.

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[192] *Ibid*., rules 493-495.

[193] See the text accompanying notes 581 and 593 below.

ROMAN ORIGINS AND EUROPEAN REVIVAL: INTERLOCUTORY PROCESS IN CIVIL LAW

Until very recently, the admiralty action *in rem* was considered to be of Roman origin. As noted above,[194] Prichard and Yale conclude, without a lengthy explanation, that the action *in rem* is probably not a derivative of Roman law as has been supposed by lawyers and authors since the end of the eighteenth century.[195] But how can one be certain? In order to respond, a short overview of Roman procedure as received in Europe may be of assistance.

English maritime law was, and remained even after the merger of the nineteenth century, a law derived from the principles of continental law. There are medieval maritime law digests, including the *Consolat del Mar*, written in Barcelona in the thirteenth century, and the *Rolls of Oleron*, collected in France, possibly as early as the *Consolat del Mar*, but many basic rules of maritime law are much older, dating from the days of Roman law. Maritime law appears in several books of the Digest of Justinian of 533 A.D., some incorporating even earlier Rhodian sea law. The Digest was not a statute in the modern sense, but rather a selection of the doctrines propounded by classical Roman law authors. Justinian's fiat gave to the selection the seal of authority, but recognition had earlier been given to the same writings by Roman emperors and courts.

Several Roman statutes have survived, but the writings from which the Digest was drawn have not. Classical Roman law, as known today, is thus limited to Justinian's selected texts, as expounded in the Digest and Istitutes and, with the exception of one copy of Gaius' Institutes and one copy of the Digest itself, dating respectively from the fifth and sixth centuries, virtually all original Roman law texts referred to in the Digest have been lost.

Several books of the Digest speak to substantive maritime law, and several to Roman law procedure, but none speak to the practice of maritime law. It can only be concluded that maritime law litigation in Rome was carried out under the general rules of procedure. Modern admiralty

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194 See the text accompanying note 41 above.

195 See for example, Arthur Browne, *A Compendious View of the Civil Law and of the Law of the Admiralty*, 2nd ed. (London: Butterworth, 1802) [hereinafter Browne], vol. II, at at page 99.

practice since the middle ages has been developed as unwritten custom, by civilians in maritime courts, including the admiralty courts of England, based in part on Roman law procedure.

Roman Law

Roman law is a subject of such depth and variety that it would be illusory to think that any aspect of it can be sufficiently explained in a few pages by any author. It is a mature body of law that miraculously escaped a fate, that two thousand years of history has probably reserved for several other legal systems.

Roman law continued to exist in early medieval times, largely through the spread of Christianity and canon law, but the re-surfacing of portions of, and especially the complete Florentine copy of Justinian's Digest, led to the revival of the study of Roman law in Italy in the 1100s and, much later in 1816, the discovery in Verona of an almost complete fifth-century copy of the Institutes of Gaius allowed historians to better explain passages of the Digest and to grasp for the first time the early Roman law of civil procedure, as it stood in the second century and in Justinian's day.[196]

From the time of the Twelve Tables in 450 B.C. to that of Gaius in the mid-second century A.D., the nature of Roman legal actions had taken different forms. The earliest form was that of the *legis actio* or, statute action.[197] In order to make a claim in law, the claimant had to meet the wording of the statute precisely. The term *legis actio* meant the proceeding granted by the statute but, by extension, a right of action or proceeding given by the statute. Gaius refers to the

[196] Classical Roman jurists wrote little about procedure, but there are several extant examples of Roman legislation. The *Codex Theodosianus*, compiled in Constantinople in the fifth century, refers to even earlier codifications of legislation that have not survived, but these were generally replaced by the *Codex Justinianus* first published by Justinian in 529 A.D., and replaced in 534 following the publication of the Digest. For a description of Roman law in Anglo-Saxon England, see John Frederick Winkler, "Roman Law in Anglo-Saxon England" (1992) 13 *J. Legal Hist*. 101.

[197] There are many sources of information on Roman law. German authors of the nineteenth century were particularly prominent in this field. See for example, Frederich Karl von Savigny, *Histoire du droit romain au moyen âge* (Paris: Hingray, 1839) and his contemporaneous *Traité du droit romain*, (Paris: Firmin Didot, 1840). For a more modern German text, see Max Kasar, *Roman Private Law*, 2nd ed. (London: Butterworths, 1968). With regard to Roman law procedure, perhaps the most accessible in the English translation is Arthur Engelmann, *A History of Continental Civil Procedure*, (Boston: Little Brown, 1927) [hereinafter Engelmann].

procedure in Book IV of the Institutes.[198] He describes the most common form of *legis actio* as the *legis actio sacramento* or the action by oath.[199]

The *legis actio sacramento* involved each party promising to pay a sum of money if they were to lose the case, although the nature and amount is not clearly understood, and might have been designed solely to cover costs.[200] The most interesting aspect of the proceeding for present purposes is that the *legis actio sacramento* could be *in rem* or *in personam*. Gaius starts Book IV of his Institutes with the statement that there are two classes of action, real and personal.[201]

But real and personal should be understood as actions that affect either a thing or a person. A real action in Roman law was not restricted to what in English law is considered to be real property. A real action could concern as much real as personal property and even living property such as slaves or cattle. The key was that the claimant was seeking title or possession or both. Gaius gives the example of a slave for whom two parties dispute ownership. The property in dispute was brought before the prætor representing the *jus* or the state.[202] Each party would state its claim. If the property could not be brought before the prætor, a symbol would be brought. Gaius gives the example of bringing a piece of a ship.[203] Each party was then asked to state its claim and interim possession was given to one party in exchange for security given to the other, should the latter prevail in the dispute.[204] The prætor also sought security for costs from each party.[205]

This *litis contestatio* would result in the matter being then submitted to the *judicium* or to the judge representing the people of Rome. Personal actions proceeded in the same manner, with the exception of the requirement of bringing property before the prætor and giving security for interim possession.

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198 The edition of the Institutes of Gaius referred to herein is that of W.M. Gordon and O.F. Robinson, *The Institutes of Gaius*, (Ithaca: Cornell University Press, 1988) [hereinafter Gaius].

199 Gaius, IV.13. Luckily, this common type of *legis actio* is described in Gaius, as the other less common forms of *legis actio* were described in parts of the Institutes that were illegible, even in the Verona manuscript. See Engelmann, at pages 279-282.

200 Engelmann, at pages 271-273.

201 Gaius, IV.1.

202 Englemann points out at pages 247 *et seq.* the difference between the *jus* and the *judicium*, the latter being the judge representing the people. The dispute first came before the prætor and if it were determined to require adjudication, was sent to the *judicium* or judge.

203 Gaius, IV.17.

204 Engelmann, at page 275, states that interim possession would be "undoubtedly" given to the party that offered the best security, but Gaius does not make this distinction.

205 Gaius, IV.16.

However, even by Gaius' time, the *legis actio* had long given way to what was termed the formulary procedure.[206] The need for change was doubtlessly the stiffness of the former and the more flexible nature of the new procedure. Instead of the prætor permitting the *judicium* in the *legio actio*, he commands *judicium* under the formulary procedure by virtue of his official authority, as long as the declarations of the parties corresponded to the form prescribed by statute, even where no *lex* was alleged in support of the claim.

The formulary procedure gave precedence not so much to the form chosen, but to the facts that supported the claimant. Thus, the prætor was required to determine whether the facts give rise to a right at law.[207] The answer to the question depended not only on statute law, but on the prætor's discretion. In this way, new causes of action could be created by the prætor's determination that the facts justified a *judicium*. Gaius sets out the steps in a formulary action, including principally the statement of facts and the pleading.[208] What was a system of substantive rights at the time of the Twelve Tables, thus became a system of rights of action.[209]

The prætor could order remedies to give effect to legal rights. This included *missio in possessionem*, prætorial stipulations and interdicts. *Missio in possessionem* allowed a party to take possession of another party's property. It could be in the form of a *missio in bona* in personal actions, where the entire estate of a debtor was to be seized and sold for the pro rata benefit of all creditors. These remedies could be sought even when the debtor appeared to defend the action. If he appeared and then defaulted, a *missio in bona indefensi* would lead to a *missio in bona*, again to the benefit of all creditors.

But specific property could be seized by way of *missio in rem* which did not involve claims of other parties. The *missio in rem* was available in a real action where the defendant defaults, or, in cases of immovable property, where the defendant fails to give security for alleged damage to property caused by the dangerous condition of the immovable property of the defendant.[210] In either case, the claimant was allowed to take possession of the contested property or, for a *missio in rem* for refusal to provide security in the case of the dangerous immovable, to take possession

206 Gaius, IV.30.
207 Engelmann, at pages 286-287.
208 Gaius, IV.39.
209 Engelmann, at page 293.
210 *Ibid*., at pages 308-309.

of the immovable under a first decree and to take title thereto under a later, second decree. The link between default and *missio* was due to the fact that the default of the defendant prevented the *judicium* from taking place, as it took the appearance of both parties to hold a trial.

Prætorian stipulations were ordered by the prætor on the application of a claimant moving for security for costs.[211] Interdicts were also available on motion of a party, but were conditional upon the moving party proving in the *judicium* that he had a right in the first place. The interdict in this sense is not dissimilar to the modern-day interlocutory injunction.[212]

But the Roman law system of Gaius' time, based on formulary procedure, eventually gave way, like the *legis actio* system before it, to an even more flexible system and the *actio* became the right of action found in the substantive law.[213] The new *cognitio* procedure left behind the *jus* and *judicium* of earlier times to become a unitary procedure whereby the claimant had the defendant summoned to the magistrate, now termed *judex* and by whom the dispute was to be heard and decided in a sentence issued in the form of a decree.[214]

Execution of final decrees in Roman law had always been, at least in theory, available against the defendant who could be imprisoned, enslaved or even killed.[215] However, by the time of the *cognitio* procedure, execution was more routinely obtained by the seizure and sale of the defendant's property through the issuing of a *missio*, granted without hearing the debtor. The seizure and sale, being for the general benefit of the debtor's creditors even at the execution of judgment stage, was often more a method of putting pressure on the debtor than of obtaining payment of the claimant's debt.[216] The *missio* allowed the claimant to proceed to sale, but also to take possession immediately of any movables that might risk disappearing.

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211 *Ibid*., at pages 310-311.
212 *Ibid*., at pages 311-315 and D.43.1.1.1.
213 *Ibid*., at page 319.
214 *Ibid*., at page 320. Kaser explains that the new procedure commenced as a parallel remedy to the formulary procedure. See Kaser, *Roman Private Law*, *supra*, note 197, at page 334, and for a full description of the new procedure, pages 359 *et seq*. See also C.H. van Rhee, "The Role of Exceptions in Continental Civil Procedure" in Paul Brand, Kevin Costello and W.N. Osborough, eds., *Adventures of the Law* (Dublin: Four Courts Press, 2005), at page 92.
215 Kaser, *Roman Private Law*, *supra*, note 197, at pages 338, 355 and 366.
216 Engelmann, at page 378.

By Justinian's time, this new unitary procedure was in full force, and proceedings commenced with a libel or written complaint. A judge reviewed the libel and, unless manifestly unfounded, issued a summons to the defendant to be served with a copy of the libel. From then on, much as today, the judge was able to determine the rights of the parties before him without need for formulæ or questions from some superior.

As the action-based procedure became popular, a more limited execution of specific property of the judgment debtor was developed in cases where the debtor was not insolvent. On motion of the creditor, the judge could order the seizure and sale of specific goods which were then distrained and sold in execution of the judgment.[217] Movables were first seized, followed, if need be, by immovables and then by choses in action.

But Roman law did not provide for general security before judgment through seizure or attachment. The *missio* was designed to be more a means of putting pressure on a debtor, than of securing judgment.[218] It was used in execution of judgment, but could also be sought on an interlocutory basis, as a remedy to oblige a defaulting debtor to do some act. In real actions, the defendant could be obliged to provide security, in default of which, the property in dispute would be put in the possession of the claimant and the defendant would thus have to prosecute a claim to get it back.[219] Where required, security was given by third-party sureties or by the defendant's own *cautio juratoria* or juratory caution.[220] But no general seizure before judgment was known to Roman law.

As has been seen, the procedural law of Rome was adapted from time to time to accommodate the flexibility required in a developing legal system, much as modern codes of procedure are regularly adopted and amended. Engelmann uses the adjectives "Romanic" or "Romano-canonical" to describe the law that at the outset mirrored Roman law, but which was revived and re-introduced in Italy and later across Europe in the middle ages.[221] Justinian's codes, issued in Constantinople in December of 533, reflected the law that had been Roman prior to the fall of Rome in 476. These codes re-introduced Roman law anew throughout the former empire in 554

[217] *Ibid*., at page 381.
[218] *Ibid*., at page 384.
[219] *Ibid*., at pages 400-401.
[220] *Ibid*.
[221] *Ibid*., at page 418.

as Justinian expanded the Holy Roman Empire into Italy and beyond. However, this expansion was not to last, as the Lombards invaded Italy in 568.

The resulting European mix of Lombard, Germanic and Roman procedure went through several filters and was subjected to the influence of canonic procedure and local legislation, depending on where and before what court process was issued.[222] An example of a medieval treatise on European procedure finding its way into admiralty law on the continent and in England is the treatise referred to as the *Ordo Judiciorum*.[223] Twiss suggests it would have been written at the end of the fourteenth or beginning of the fifteenth century by an Italian civilian attached to the University of Bologna.[224] He suggests that the admiralty procedure in England underwent some updating and improvement during the first decade of the fifteenth century when Sir Thomas Beaufort was made admiral for life and his nephew, John Beaufort was admiral of the northern and western fleets.[225]

Article 20 of the *Ordo Judiciorum* sets out the effect of a default or contumacy on the part of the defendant. The default of a defendant and the ensuing remedies of seizure remained as they had been in Roman law. In real actions, the plaintiff would be put in possession of the disputed property, subject to the right of the defaulting or contumacious defendant to demand the return. In personal actions, the plaintiff would be put in provisional possession of a portion of the contumacious defendant's estate, sufficient to secure the claim, and if contumacy continued, that possession would become permanent.[226]

Contumacy, Security and Summary Procedure

Contumacy in Roman law was not simply a default to act, but rather a default to do some act ordered by the court. The consequences of contumacy varied as Roman law was adapted into European law, but seizure of property was the common thread. Where a defendant did not respond to the court order, his property could be put into the possession of the claimant. In real

222 *Ibid.,* at pages 420 to 431 wherein Engelmann sets out the detail of the mix of procedure.

223 *Ordo Judiciorum*, *supra*, note 43. Twiss copied the British Library Cottonian MS Vespasian B in volume 1 of the *Black Book*, *supra*, note 26, although the original Black Book of the Admiralty, now found in the National Archives at HCA 24, was missing at the time. The *Ordo Judiciorum* text in HCA 24 is thus not identical to that in Twiss's volume.

224 *Black Book*, *ibid*., vol. 1, at page xxxiv.

225 *Ibid*., at xxxv.

226 See Engelmann, at page 431. See also Codex VII.39.1.8.3.

actions, the possession would be of the thing in dispute and in personal actions such property that was necessary to secure the claimant's demand.[227]

But default and possession did not mean that no trial on the merits would be required. If the claimant was in default of fulfilling a court order, the risk was rather that his claim would be, if not summarily dismissed, heard in his absence, and the defendant would have every advantage of having the upper hand. Similarly, where the defendant was contumacious, being put in possession of the defendant's property did not prevent the claimant from having to prove his case, but in dong so, the absence of the defendant would play to the advantage of the claimant. In later Romano-canonical procedure, the claimant set out his case in a written libel delivered to the defendant at a first hearing, although he would also plead orally upon this first appearance of the defendant. The defendant could immediately at the first hearing, or at a subsequent hearing, inform the court that he intended to contest, which was called *litiscontestation*.

Thus, in a real action, the default of the defendant to attend a hearing before litiscontestation, would result in the seizure of the thing in dispute after a summary investigation by the court, subject to the contumacious defendant's right to redeem it within one year of the seizure. After this delay, the property would be deemed to be that of the claimant and no further proceedings would be required. Contumacy after litiscontestation led to an *ex parte* hearing of the claimant and, were the claim to be successful, title to the property in dispute would be definitively adjudged to the claimant.[228]

In a personal action, the defendant's default at any stage would lead to the seizure of sufficient property to secure the claimant's demand and would be followed by an *ex parte* hearing, which, if successful, would result in a first decree formally transferring custody of the seized property to the claimant and, after one year without a motion by the contumacious defendant for redemption, a second decree would definitively award title to the property to the claimant. Each time the defendant would have to be served with notice of the steps taken.[229]

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227 Engelmann, at page 465.
228 *Ibid*., at page 464.
229 *Ibid*., at page 465.

The giving of security was thus developed during the medieval period. Roman law had known both security for interim possession in real actions, as well as security for costs and the calumny oath. The latter was given by a party at the request of his opponent to confirm the good faith of the step taken.[230] By Justinian's time the calumny oath was mandatory at the time of litiscontestation, for not only both parties but their advocates as well.[231]

In Gaius' day, Roman law did not require mandatory security from the claimant.[232] However, by Justinian's time, the claimant had to provide security that he would prosecute the claim to judgment, failing which he would pay damages to the defendant,[233] and that he would further pay costs to the defendant set at one tenth the value of the claim, should the claim be unsuccessful.

The defendant on the other hand, had various security obligations in all periods of Roman law. Although, like the claimant, the defendant was not obliged to provide security in general in Gaius' time, he was by Justinian's time obliged to provide security for costs, that he would participate in the litiscontestation and proceed with his defence.[234] However, there were exceptions in all periods, especially where the defendant was or was shown to have previously been insolvent.

In real actions during the *legis actio* period, the state gave interim possession of the contested property, most often in the possession of the defendant, to the party who could furnish security that it would not be lost. In the later formulary period, the defendant was obliged in a real action to give security for the value of the contested property, undertaking to deliver it up upon judgment in favour of the claimant. The security also guaranteed the continued participation of the defendant in the proceedings, failing which judgment by default could lead to the claimant obtaining an order for possession in his favour, thus triggering the security. Engelmann points out that where the defendant's refusal to give security in a real action resulted in possession

230 Gaius, IV.172 *et seq*.
231 Inst. IV.16.1.
232 Gaius IV.96 for real actions and IV.100 for personal actions.
233 Engelmann points out at page 400 that damages would be calculated at double the damages suffered by the defendant up to a maximum of 36 aurei.
234 Engelmann, at page 401.

being transferred to the claimant, the defendant would then have to take his own claim in redemption.[235]

These notions came to Europe with the Roman-canonical procedure. In the later European civil law, the claimant had to furnish security to the defendant that he would be ready for litiscontestation in the prescribed delay[236] and that he would pay the defendant's costs, set at one tenth of the value of the claim, if he were to be unsuccessful. The defendant now had to give security that he would abide by the judgment and, in a real action, not damage or dispose of the contested property.[237] Should the contumacy of the defendant lead to a *missio in possessionem*, the motion of the defendant for redemption required security that the property would remain available to fulfill the judgment. Security was in all cases provided at all periods by sureties recognized by the court, or by the parties and in certain cases by the juratory caution of the party.[238]

In Justinian's time, even the proctors could be required to provide their own security, the claimant's proctor attesting to the seriousness of the claim only in doubtful claims, but the defendant's proctor had each time to secure that the defence would be in good faith. As for the parties, the amount of security depended on the nature of the case and the circumstances.

Thus security was a well known concept in all stages of Roman law and in the European law that adapted Roman-canonical procedure to its changing needs. But it is clear that the security derived from Roman law was more related to the conduct of the action than to the outcome, with the exception of real actions where title or possession of property was in dispute, and, in personal actions, where the defendant was contumacious.

European law also developed the notion of proceeding summarily. Summary procedure, being an exception to the normal procedural rules, was developed in commercial disputes in the medieval Italian cities.[239] In such cases, delays were set, steps like formal litiscontestation and calumny

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235 *Ibid*.
236 The delay was generally two months. See Engelmann at page 470.
237 Engelmann, at page 470.
238 *Ibid*., at page 401.
239 *Ibid*., at page 493. Engelmann points out the importance of the fourteenth century canon law procedural amendments made by Pope Clement V, including the *Clementina Sæpe*, decreed in 1306. See Engelmann at page 495 for the full text of the decree.

oaths were abandoned, and proof was curtailed. The Italian statutes applied to cases where demands were simple and proof available in writing. One example was the Lombard rule that an order could be obtained in certain cases to perform an obligation or pay damages, such orders being executed if the defendant did not take steps to have a hearing set within a fixed delay.[240]

Another summary procedure involved the pledge given in writing by a debtor.[241] This was derived from Lombard practice before the re-introduction of Roman law, and depended on the defendant giving the pledge by written contract. Upon default, the creditor could take the thing pledged as a binding stipulation of the debtor. Pledges in this sense were a form of consensual security that led directly to execution in case of default. Their effect was like a confession of judgment. The only intervention of the court would be to recognize the existence and veracity of the pledge document, without considering any defence to the underlying debt alleged.

The pledge practice of Lombard law led to the concept of attachment.[242] Pledges were given in writing against property, but the extent of the property to be taken in case of default on the debt was left to the court to decide. The concept was further developed with regard to foreign debtors who had contracted a debt in the jurisdiction but who had not given a formal pledge. If the foreigner had no residence or place of business in the jurisdiction, a procedure parallel to the claim on the debt was developed whereby the court could order the attachment of the property of the foreigner which might be found in the jurisdiction, to be held as security for the main proceedings. As shall be seen, this concept of foreign attachment later even found its way into English law.[243]

All of these summary procedures had thus become known in the Italian cities in the fourteenth century, the century of the commencement of the admiralty courts in Europe. No general concept of security for the amount claimed in a personal action was known to Roman law. But the law applicable on the continent, and especially in France, was a mix of Roman and customary origin.

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240 *Ibid*., at page 497.
241 *Ibid*., discusses this development of Lombard and Italian law at page 498.
242 Engelmann explains the development at pages 500-501.
243 See the text accompanying note 389 below.

French Civil Law

French civil law is of special importance for present purposes, not only because it was in part a variant of Roman law, but because the courts of Quebec, including the courts of admiralty, were set up by the French kings and applied French law up to the arrival of the British in 1759. French civil procedure in medieval times, much like British civil procedure, underwent various mutations, including trial by battle,[244] replaced by an inquest procedure, borrowed from the canon law,[245] but oral procedure in France, as in England, continued until it was replaced by written procedure.[246] Gradually, royal justice and the Parlement de Paris brought canon law written procedure to the courts in France.[247] Much as it does today, this involved a complaint, a defence and evidence leading to a judgment.

As in Roman law and medieval Italian law, security and arrest or seizure could result in French procedure from the default or contumacy of the defendant. In the later medieval period, default proceedings involved three distinct steps. A first default and a second default were of little consequence as concerns real property suits, but led to the progressive forfeiture of declinatory and dilatory defences in personal actions.[248] However, upon a third default, judgment would be granted to the claimant upon summary proof of his claim.

Default, later termed dismissal, was also possible against the claimant who failed to appear or to deliver copies of the documents supporting the claim. A defendant failing to appear or to defend by delivering his answer and documents was declared in default, as was either party failing to

244 Trial by battle had disappeared before the 1200s in France, but was still available for suits based on acts of violence until Saint Louis outlawed it later that century. See Engelmann, at pages 650 *et seq*.

245 *Ibid*., at page 653.

246 Engelmann cites Comte Beugnot's edition of Philippe de Beaumanoir, *Les Coutumes du Beauvoisis*, (Paris: Renouard, 1842), a thirteenth-century French procedural treatise, where in volume 1 at page 107, and volume 2 at page 94, the "recort" or record is described as the written recollection of the arbitrators or assessors of the court as to the judgement previously given orally. Obviously, if the parties could not recollect what was said, they would not likely have confidence in the assessors' version. This would have given rise to the creation by the clerks of a record of allegations, evidence and of the decision, not unlike the private recording of oral pleadings and judgments in the English Year Books.

247 Engelmann, at pages 665 *et seq*., situates the changes in the fourteenth century with the publication in 1330 of Guillaume De Breuil's *Stilus Curiæ Parlamenti*, another procedural treatise.

248 Engelmann, at page 684, provides the background and detail of the effects of default.

plead the case on the designated day. All of these defaults required a judgment upon the motion of the opposite party.[249] The requirement of multiple defaults would gradually be abandoned.[250]

This streamlining of contumacy proceedings was later crystallized in the Ordonnance of Civil Justice of 1667. [251] One of the great legislative feats of the reign of Louis XIV, and of his most prolific minister Jean-Baptiste Colbert, the Ordonnance of 1667 brought together the jurisdictional and procedural practices throughout France. At the time, procedure in the country was divided between the southern region, where Romano-canonical procedure prevailed, and the northern region where customary procedural rules were followed. The Ordonnance of 1667 would apply throughout the country, and as far abroad as in New France.

The Ordonnance of 1667 was modern and at the same time a link to the medieval past.[252] Security and possession went together in medieval French law. A person suffering the disseisin or loss of possession of something previously in his possession, regardless of title thereto, could complain about the loss of seisin to the courts. Interlocutory possession thereof would be given to the complainant on the condition that he provide security.[253] If the defendant also provided security the matter would be set down to be heard. The party proving possession for a year and a day would be successful and an action for loss of seisin was barred after that delay. The losing party was fined, but had an additional year to sue for title to the disputed property.[254]

French medieval law had simplified the procedure of contumacy or default and that of execution. The term default was usually attributed to the contumacy of the defendant and dismissal to that

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249 *Ibid.*, at page 685.

250 *Ibid.*, at page 725.

251 Ordonnance civile touchant la reformation de la justice, adopted by Louis XIV at St-Germain en Laye in April 1667 [hereinafter Ordonnance of 1667], Title I, article 1. For the text of the ordonnance, see François André Isambert *et al*., eds., *Recueil général des anciennes lois françaises* (Paris: Plon Frères, 1821-33), vol. XVIII, at page 103. For a Canadian version see *Édits, ordonnances royaux, déclarations et arrêts du conseil d'État du Roy concernant le Canada* (Quebec: Fréchette, 1854) [hereinafter *Édits et Ordonnances*], at page 107. An earlier version was published under the same title in Quebec by Desbarats in 1803, but the 1854 publication is more complete. Prior to the adoption of the French *Civil Code* in 1804, the Ordonnance of 1667 was commonly called the Ordonnance civile or even the "Civil Code".

252 See C.H. van Rhee, "The Role of Exceptions in Continental Civil Procedure" in *Adventures of the Law*, *supra*, note 214, at page 95.

253 Engelmann, at page 695, cites the 1272 *Établissements de St-Louis* as the source of this affirmation. For a recent English translation, see F.R.P. Akehurst, *The Établissements de Saint Louis* (Philadelphia: University of Pennsylvania Press, 1996).

254 Engelmann, at pages 695 *et seq*, describes the proceedings in detail.

of the claimant.[255] The opposite party could "obtain" the default of the defendant or dismissal of the claimant upon motion. As to execution of final judgments, the remedy of civil attachment or imprisonment ("*contrainte par corps*") was available. Where the judgment was for the possession of land, failure to surrender possession in a timely manner was enforced by this means .[256] Failure to pay a money judgment within the prescribed delay[257] was also enforceable by civil attachment.[258]

But these remedies were revised by the Ordonnance of 1667. The importance of this law for present purposes is that it came into force shortly prior to the creation of a court of admiralty in Quebec and remained applicable in Quebec throughout the French regime. The nineteenth century codification of French law by Napoleon was never applicable in Quebec, although the codification of Quebec law in 1866 borrowed heavily from the Napoleonic codes.

The Ordonnance of 1667 was made to apply to all royal courts in France and in French possessions. It was to be published and registered in all royal courts, and was registered in the registers of the Conseil supérieur of Quebec on November 7, 1678.[259] The striking feature of the Ordonnance of 1667, like many of the ordonances of Louis XIV, is its modernity. Civil procedure became standardized and simplified for all French courts at home and abroad. Nothing like it existed for English law or for admiralty courts in the British empire until the nineteenth century. However, as shall be seen, the British admiralty and vice-admiralty courts had their own civil law procedure that was not in need of a code of civil procedure.

Modernity notwithstanding, the Ordonnance of 1667 contained no process akin to *in rem* actions in admiralty. The code did refer to real and personal property and to seizures and the arrest of

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255 *Ibid*., at page 724.

256 Usually 14 days. See Engelmann, at page 727.

257 This was set at four months by article 48 of the Ordonnance sur la réforme de la justice, adopted by Charles IX at Moulins in February 1566 [hereinafter Ordonnance of 1566]. For the text of the ordonnance, see François André Isambert *et al*., eds., *Recueil général des anciennes lois françaises* (Paris: Plon Frères, 1821-33), vol. XIV, at page 189.

258 *Ibid*., article 48.

259 The practice in France was that all royal ordonnances were registered in the parlements and other royal courts. In colonies like Quebec there were no parlements, but there was a Conseil souverain where many but not all royal ordonnances were registered. Registration was not considered necessary in the colonies, and the reason why some but not all royal legislation was registered has baffled historians. See J. Delalande, *Le Conseil souverain de la Nouvelle France* (Quebec: Proulx, 1927), at page 289. See also J. Camille Pouliot, *Glanures Historiques et Légales: Autour de l'Ordonnance de la Marine de 1681* (Quebec: Dussault & Proulx, 1925), at pages 21 *et seq*.

defendants in execution of judgments, but in a context that cannot be compared to admiralty process *in rem*.

With regard to the arrest of debtors, the Ordonnance relaxed the provisions of the earlier Ordonnance of 1566, allowing for the arrest of a debtor who had failed for four months to pay a sum of money adjudged by final judgment.[260] The Ordonnance of 1667 provided that the remedy would no longer be available in civil suits. However, there were exceptions. Where damages or costs awarded in a civil suit amounted to 200 pounds or more, *contrainte par corps* remained available.[261] The remedy also remained available for various other actors such as tutors and curators, depositors, sequesters and for certain debts between merchants.[262]

The Ordonnance of 1667 was also careful to preserve the charter rights of ports and towns to arrest debtors under their local laws.[263] And to permit *contrainte par corps* if that remedy was agreed in a lease of land in the countryside.[264] Women and the elderly were no longer subject to arrest even under a lease, but could be arrested for *stellionat*, a term for fraud with regard to property, or if acting as a merchant.[265] In all these exceptions, arrest was only possible after four months had passed since the judgment, and was not an impediment to alternate remedies, such as seizures in execution of judgment. As shall be seen, English law retained personal arrest much longer than did French law.

Colbert achieved another milestone with the Ordonnance of Commerce of 1673 which expanded upon the *contraint par corps* provisons of the Ordonnance of 1667.[266] The Ordonnance of 1673 would later be used in the preparation of the Napoleonic *Commercial Code*. The Ordonnance provided for *contrainte par corps* for merchants involved with bills of exchange, but also for commercial marine contracts such as charter-parties, marine insurance policies, ship sale

260 Ordonnance of 1566, *supra*, note 257, art. 48.
261 Ordonnance of 1667, *supra*, note 251, title XXXIV, article 2.
262 *Ibid*., articles 3 and 4.
263 *Ibid*., article 5. See the text accompanying note 274 below.
264 *Ibid*., article 7.
265 *Ibid*, articles 8 and 9.
266 Ordonnance du Commerce, adopted by Louis XIV at Versailles in March, 1673 [hereinafter Ordonnance of 1673], Title VII, article 2. For the text of the ordonnance see François André Isambert *et al*., eds., *Recueil général des anciennes lois françaises* (Paris: Plon Frères, 1821-33), vol. XIX, at page 92. Prior to the adoption of the French *Commercial Code* in 1807, the Ordonnance of 1673 was commonly called the Code marchand or the "Commercial Code". It was also sometimes called the Savary Code, after Jacques Savary, a French economist who was one of the authors.

agreements, and for unpaid freight. But the remedy remained a remedy of execution, requiring an unsatisfied final judgment, and was further subject to the limitations set out in the Ordonnance of 1667. Unlike that of 1667, the Ordonnance of 1673 was never registered in Quebec, but was applied in the civil courts, including the Prévôté.[267]

But with regard to the attachment of ships or other personal or real property *before* judgment, the Ordonnances of 1667 and 1673 are conspicuously silent. As is what might be said to have been Colbert's greatest legislative achievement, the Ordonnance of the Marine of 1681.[268] By that time, Colbert was Louis XIV's Secretary of State for the Marine. But that title hardly translates the power Colbert wielded over the legislative and administrative branches of the realm. He is said to have controlled more than two thirds of the affairs of state, and all finances of government.

The Ordonnance of 1681 is yet another example of the modernity of French legislation under Louis XIV. So much so, that it is still a model for maritime codes in civil law countries around the world. There has never been anything like it in English legislation, or in the legislation of the English speaking world. Written as a code and divided into five books, the Ordonnance covers virtually all aspects of maritime commerce.

The first book of the Ordonnance of 1681 concerns the jurisdiction of the admiral and admiralty court process. The second concerns the construction and measurement of ships and all aspects of the profession of their crews, *les gens de mer*. The third book concerns maritime law and contracts, including insurance, charter-parties and general average, as well as prize law and

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267 See Edmond Lareau, *Histoire du droit canadien* (Montreal: Librairie générale de droit et de jurisprudence, 1888), vol. 1 at page 317.

268 Ordonnance de la Marine, adopted by Louis XIV at Fontainebleau on July 31, 1681 and published in August that year. [hereinafter Ordonnance of 1681]. For the text of the ordinance, see François André Isambert *et al*., eds., *Recueil général des anciennes lois françaises* (Paris: Plon Frères, 1821-33), vol. XIX, at page 282. Ten years earlier, Colbert had confided the office of port visitation to Henri Lambert d'Herbigny, and the eighteenth-century French jurist René-Josué Valin argues that the Ordonnance of 1681 was based on Lambert's memoires. Valin was the king's counsel in the admiralty court of La Rochelle. His comments on the Ordonnance of 1681 are the most often cited version of the ordonnance. They were published in multiple editions, starting in 1749, with a second posthumous edition in 1776. See page v of that edition for the reference to Lambert. Valin's comments explain the origin and essence of each article of the legislation and were as often cited as the text of the ordonnance itself. The most cited edition of Valin in recent times is possibly that of 1841. See R.J. Valin, *Commentaire sur L'Ordonnance de la Marine* (Paris: Joubert 1841).

letters of marque. The fourth book covers ports, docking pilots, the coast guard and marine casualties. The final book concerns fisheries and fishermen.

The first book of the Ordonnance includes title XIV on the seizure and sale of ships. The first article in the title establishes that all ships are movable and subject to seizure in justice, and that their sale by a competent court will be free and clear of all privileges and hypothecs.[269] The manner of sale by auction is fully described, as is the order of payment of debts from the proceeds of the sale. The legislation simplified the existing formalities of sale of immovable or real property, which required several additional steps. Prior to 1681, these additional steps applied to varying degrees to the seizure of ships in execution throughout France.

However, the seizure of a ship under title XIV still required a judgment, and no mention is made of the attachment of ships before judgment. Today, interlocutory attachment in French law is called *saisie conservatoire*, conservatory seizure, or seizure before judgment. But seizure before judgment was only rarely available in customary French law during the period under review. There were no references to it in the Ordonnance of 1667, or in those of 1673 or 1681. Each of these enactments referred solely to seizure in execution of judgments.

But, as mentioned above with regard to civil procedure, French substantive law was composed of the law applied in the southern part of France, where Roman law and procedure as adapted in Italy had become the written law, and the law applied in Paris and the north, where customary or unwritten law was applicable until the Napoleonic codifications of the beginning of the nineteenth century.

The Custom of Paris was a mix of judge-made law and legislation, but was not an all-encompassing code. It was adapted to a seigneurial system of feudal law. For matters not included in the Custom of Paris, including obligations such as contract or delict, as well as all

[269] These are the civil law terms for liens and mortgages. Valin, in his comments on this title, reminds the reader that hypothecs or mortgages could not be given on movable property under French customary law. However, the contrary was true in foreign countries and in those parts of France ruled by written or Roman law. It is for this reason that the concept was included in the Ordonnance of 1681.

aspects of maritime law, written Roman law was generally applied, as adapted by the courts. The Custom of Paris was applicable outside of Paris in the French possessions, including Quebec.[270]

The works of the great eighteenth-century French jurist Robert-Joseph Pothier explain the process of seizure under the Ordonnance of 1667, but also mention the customary *simple arrêt* or simple seizure, which was a variation of a seizure before judgment.[271] Simple seizure enabled a creditor to seize the personal property of the debtor before judgment, often without judicial leave, but was only available in limited cases. Pothier cites examples of simple seizures from the Custom of Paris and the Custom of Orleans.[272]

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[270] Customary law had been of an oral tradition throughout northern France from medieval times, but in April 1453, the Ordonnance ou Établissements pour la reformation de la justice issued by Charles VII at Montils les Tours decreed that the justice system be reviewed and, by article 125, that the oral customs be reduced to writing, to avoid debate as to which customs were applicable. For the text of the ordonnance, see François André Isambert *et al*., eds., *Recueil général des anciennes lois françaises* (Paris: Plon Frères, 1821-33), vol. IX, at page 202 and for article 125, see *ibid*., at page 252. The king was to approve each codified custom but, due to extended delays, on January 21, 1510 Louis XII ordered that the lieutenant civil of the Prévôté of Paris convene a form of *états-généraux* of nobles, clergy, bourgeoisie and practitioners to approve the proposed codification of the Custom of Paris, and that it be thereafter registered in the Parlement of Paris. See *ibid*., vol. XI, at page 560, where Isambert describes the participants and the proceedings. They are described in somewhat more detail by Olivier Martin, *Histoire de la Coutume de la Prévôté et Vicomté de Paris* (Paris: Ernest Leroux, 1922), vol. 1, at pages 104 *et seq*. A similar practice was ordered on the same date for all other customary jurisdictions. See Isambert, vol. XI, at page 609. The full name of the Parisian version was the *Coutumes de la Prévôté et Vicomté de Paris* [hereinafter Custom of Paris]. The Custom of Paris was approved and published in 1510, although later editions, notably in 1580, included much new material. The most complete editions were published in the late 1600s and 1700s, and the customs were replaced by the codification of French law including the 1804 *Civil Code* under Napoleon. For a Canadian version of the principal parts of the Custom of Paris applicable in Quebec, see *An Abstract of those parts of the Viscounty and Provostship of Paris, which were received and practised in the Province of Quebec in the time of the French Government* (London: Eyre and Strahan, 1772), often bound with companion volumes *The Sequel of the Abstract of those parts of the Viscounty and Provostship of Paris, which were received and practised in the Province of Quebec in the Time of the French Government* (London: Eyre and Strahan, 1773) and *An Abstract of the Criminal Laws which were in force in the Province of Quebec in the time of the French Government* (London: Eyre and Strahan, 1773). The final edition published in Quebec was that of T.K. Ramsay, *Notes sur la Coutume de Paris* (Montreal: Minerve, 1863). The Custom of Paris continued to apply in Quebec (with the partial exception of the short period between the Royal Proclamation in 1763 and the *Quebec Act* in 1774) until the codification of the laws of Lower Canada in the 1866 *Civil Code*. There were several French versions of the Custom of Paris brought to Québec. One of the most popular was that of Claude de Ferrière, *Corps et Compilation de tous les Commenatires sur la Coutume de Paris* (Paris: Denys Thierry, 1685). De Ferrière's Custom of Paris went through several editions, the last in 1788 just prior to the Revolution and the later codification of French law, but these volumes, and the local volumes explaining those parts applicable in Quebec, remained important until the codification of the Quebec *Civil Code* in 1866. For another popular French version see Eusèbe de Laurière, *Textes des Coutumes de la Prévôté et Vicomté de Paris* (Paris: Nyon, 1777).

[271] See M. Bugnet, *Œvres de Pothier*, 2nd ed. (Paris: Plon, 1861), vol. 10, at page 238 *et seq*.

[272] *Ibid*., pages 238 *et seq*. See Henry Fornier, *Coutumes des Duché, Baillage et Prévoste d'Orléans* (Orléans: Veuve Boyer, 1711) [hereinafter Custom of Orleans].

The Custom of Paris allowed simple seizure by *gagerie*, or *saisie-gagerie*.[273] Of feudal origin, this remedy attached chattels in the premises of a tenant whose rent is in arrears. The remedy was available to landlords and to tenants with regard to sub-leased property. It is similar to the concept of distress in common law, and involved the taking of chattels personal, without legal process. *Gagerie* did not allow the seizing party to dispossess the tenant debtor or sell the chattels, but made the debtor the custodian of his own chattels and subject to *contrainte par corps* if they disappeared. The Custom of Orleans provided for simple seizures without a court order in certain estate claims and article 445 of the Custom of Orleans specifically allowed simple seizures by shipowners of cargoes of wheat carried by water.

Both the Custom of Paris and the Custom of Orleans also allowed for simple seizure of the assets of foreign debtors for claims made by residents of the cities or counties where the contract was made.[274] As shall be seen, this was similar to the foreign attachment available in the municipal courts of certain cities in England.[275] This right of simple seizure was available under the charters of several French cities, referred to as *villes d'arrêt* or arrest cities. The version applicable in Paris was apparently first granted by Louis le Gros in 1134.[276] Anyone domiciled in an arrest city could arrest the personal property of a foreign debtor found within the city. Certain cities, but not

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[273] Custom of Paris, arts. 161, 163 and 166. For a general description of seizure and of its variations, including *saisie-gagerie*, in *ancien-régime* France, see Joseph-Nicholas Guyot, ed., *Répertoire universel et raisionné de jurisprudence* (Paris: Visse, 1784-85), vol. 16 at pages 60 *et seq*. Guyot, writing a quarter of a century after the arrival of the British in Quebec and shortly before the French Revolution, makes no mention of *saisie conservatoire* or seizure before judgment, although he mentions various simple seizures in the form of *saisie-gagerie* both under feudal law, whereby a *seigneur* could seize furnishings for unpaid rents, or under article 161 of Title VIII of the Custom of Paris, whereby any unpaid landlord could seize furniture by simple seizure, similar to distress in common law. *Ibid*., at page 104. See also, de Ferrière, *supra*, note 270, vol. 2 at pages 163 *et seq***.** Title VIII of the Custom of Paris grouped together the concepts of seizure and of *contrainte par corps*, both being methods of giving effect to decisions of the courts. *Contrainte par corps* had been available as a matter of obligation, in the sense of contractually obliging a person to submit to arrest in case of default. However, this practice would be limited by Title 34 of the Ordonnance of 1667, which abolished *contrainte par corps* arising out of a judgment for contractual breach, except in certain types of commercial contract. Article 2 of Title VII of the Ordonnance of 1673 would include maritime contracts as an exception, allowing *contrainte par corps* as a remedy for breach of contracts such as marine insurance policies and charter-parties. These exceptions would escape the limitations of the Ordonnance of 1667, but the remedy of arrest would still only be available four months after judgment, as had been decided by the Ordonnance of 1566. For more on *contrainte par corps*, see Joseph-Nicholas Guyot, ed., *Répertoire universel et raisionné de jurisprudence* (Paris: Visse, 1784-85), vol. 4 at pages 597 *et seq*.

[274] Custom of Paris, art. 173 and Custom of Orleans, art. 442. For comments on these articles and similar articles in other French cities, see Joseph-Nicholas Guyot, ed., *Répertoire universel et raisionné de jurisprudence* (Paris: Visse, 1784-85), vol. 17 at pages 529 *et seq*.

[275] See the text below accompanying notes 389 *et seq*.

[276] Custom of Paris, art. 173. For its origin, see de Ferrière, *supra*, note 270, at page 249 and Guyot, *supra*, note 274, at page 529. For a similar enactment, see Custom of Orleans, art. 442.

Paris, even permitted the arrest of the foreign debtor himself.[277] The usual notice of claim was only served at the time of the seizure to avoid the possibility of the goods being removed between the service of the notice and the arrest.

Simple seizures with a court order could be obtained in commercial matters where the claim was based on a bill of exchange or where it was alleged that a merchant was in bankruptcy or otherwise dilapidating his assets. But simple seizure was not of general application, and never described as a remedy of maritime law as such. And its application was limited to the cases set out in the various customs, including those of Paris and Orleans. The Ordonnance of 1681 contained a detailed code for the seizure of ships and their sale by the admiralty courts, but did not mention seizures before judgment by simple seizure.[278]

With the nineteenth century codifications, the customs were replaced in France, but simple seizure was only codified as *saisie conservatoire* or seizure before judgment in even fewer instances. The *Commercial Code* contained a book on marine commerce, reproducing much of the Ordonnance of 1681, but remained silent on the seizure of ships before judgment. The possibility of seizing the assets of foreign debtors was retained in article 822 of the *Code of Civil Procedure*, but now required the permission of the court.

Article 172 of the *Code of Civil Procedure* retained seizure before judgment with permission where the claim was on a bill of exchange. But although the general claim against a merchant dilapidating his assets was not codified, it remained as a remedy of traditional mercantile law and could be relied upon by practitioners to arrest assets with court permission, including ships in maritime cases, where urgent circumstances required, although not in any common measure with the *in rem* process of the English admiralty courts. However, as shall be seen in this enquiry, both of these exceptions were frequently used in admiralty courts to obtain the seizure of assets which would not otherwise have been subjected to seizure before the French civil courts of the day.

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277 de Ferrière, *supra*., note 270, at page 252.

278 See Valin's comments on title XIV of the Ordonnance of 1681, *supra*, note 268, vol. 1 at pages 359 *et seq*.

Today, things have changed in France. First, in 1955, the general concept of *saisie conservatoire* was finally codified in the *Code of Civil Procedure*.[279] A new book was added under the title *mesures conservatoires* and new articles 48 to 57 replaced the former timid references to the remedy. However, seizure before judgment in the 1955 enactment remained available only in cases of urgency, much as it had been previously.[280] And creditors were required to provide security for the seizure. France's Cour de cassation only decided in 1986 that this demonstration of urgency would no longer be required in maritime law.[281]

The 1955 remedy was a general one, and not designed for maritime law in any manner. More importantly, the adoption of the 1952 Arrest Convention by France introduced the new remedy of arrest of ships for a maritime claim as defined therein, but only for international voyages, where the convention applied. The 1952 Arrest Convention came into force in 1956. The new arrest process in convention states was designed on the *in rem* process of British origin for the first time. However, in absence of an international voyage, such as where a French national claimed against a French ship, the former law continued to apply.

In the monumental recodification of French maritime law of 1967, the remedy of seizure before judgment was included, but only by reference, and the 1955 introduction of seizure before judgment still had to be relied upon where the 1952 Arrest Convention would not apply.[282]

In 1991, articles 48 to 57 of the *Code of Civil Procedure* were replaced by a new general codification of seizure, including seizure before judgment.[283] This new enactment required the seizing party to demonstrate that, without seizure, the execution of an anticipated judgment would be in peril, thus relaxing the former urgency requirement of the general application of the remedy.[284] There was never such a requirement of urgency for arrest under the 1952 Arrest

279 See Loi n° 55-1475 du 12 novembre 1955, JORF du 15 novembre 1955, at page 11115.
280 *Ibid*., art. 2.
281 Cass. 18 nov. 1986, *D.M.F*. 1987.697.
282 See Loi n° 67-5 du 3 janvier 1967, JORF du 4 janvier 1967, page 106, at art. 70 and Décret n° 67-967 du 27 octobre 1967, JORF du 4 novembre 1967, page 10836, at art. 29. Professor René de Rodière was the author of the revised legislation.
283 See Loi n° 91-650 du 9 juillet 1991, JORF du 14 juillet 1991, page 9228, at arts. 74-76.
284 *Ibid*., art. 67.

Convention on a maritime claim. The 1991 codification and the regulations adopted thereunder, was to become the *Code of Civil Procedure on Execution*.[285]

The recodification of French maritime law was incorporated in a new *Transport Code* in 2010.[286] And in 2016, this new code was amended to introduce new provisions on seizure of ships before judgment.[287] New articles R. 5114-15 to R. 5114-19 of the *Transport Code* adapt the seizure before judgment of the *Code of Civil Procedure on Execution* to apply to the seizure before judgment of ships.

But, even today, seizure before judgment in national French maritime law is a cumbersome process when compared to arrest under the 1952 Arrest Convention. Luckily for French claimants, that convention applies much more often than the stricter rules of French law, as more and more shipments in and out of French seaports involve international traffic.

Classical Roman law went through various phases; each bringing change to civil procedure. Treatises on Roman civil procedure may never have been legion, but, luckily, enough texts have survived to allow legal historians to understand the various phases. Civilians in Europe derived modern civil procedure from a combination of Roman and canonical sources throughout the medieval period. The laws applicable in France reflect this adaptation, although, like classical Roman law, they are not able to explain the origin of admiralty process *in rem*.

But civil law also made its way to England where civilians practiced in the courts of admiralty, and it is with the backdrop of the law derived from Roman, European and French law that *in rem* process would eventually flourish. It is now proposed to look at the civil procedure the English civilians established. It will be seen that British courts took a very different view of interlocutory arrest proceedings.

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285 *Ibid*., art. 96.

286 See Loi n° 2009-526 du 12 mars 2009, JORF du 13 mai 2009, page 7920, at art. 92 and Ordonnance n° 2010-1307 du 28 octobre 2010, JORF 3 novembre 2010, at page 19645. A law of 2016 promoting French shipping, French seafarers and fishermen, *Loi pour l'économie bleue*, Loi n° 2016-816 du 20 juin 2016, JORF du 21 juin 2016, texte n° 1, states, at art. 97, that the government is to propose to Parliament a new code dedicated to maritime matters, and entitled *Code de la mer*, before the end of 2017. It is unclear whether this new code was intended to replace the marine provisions of the other codes, such as the *Transport Code*. If so, it would have been the modern-day equivalent of the Ordonnance of 1681. But 2017 came and went without a trace of a new maritime code.

287 See Décret n° 2016-1893 du 28 décembre 2016, JORF du 29 décembre 2016, texte n° 13.

CIVIL LAW PROCEDURE IN ENGLAND: CLERKE, SIMPSON, BROWNE AND FOREIGN ATTACHMENTS

In British admiralty courts, maritime law was throughout the period under review consistently referred to as the law civil and maritime.[288] That English maritime law finds its roots in civil law is beyond challenge. However, the law and procedure of ancient Rome came to those courts in the form it had taken in Europe in the middle ages.[289] The procedure of the English admiralty courts was formed during the middle ages as well, but the records of the courts only exist from the sixteenth century. That century was the age of William Fleetwood and especially of Francis Clerke, a proctor in the ecclesiastical and admiralty courts in the late 1500s.[290] Fleetwood's treatise of admiralty jurisdiction was only published in 1992, but Clerke's writings were published in several editions and have had great influence on more modern writers.

In Clerke's day, the admiralty courts had already become the target of writs of prohibition issued by the common law courts. A settlement had been reached between the admiralty and the justices of the Court of Queen's Bench on May 12, 1575, but was quickly forgotten and even disappeared from the Act Books of the High Court of Admiralty.[291] But the most active century for the civilians was yet to come. The seventeenth century began with the publication in French of the law reports of Sir Edward Coke, Attorney-General and, from 1606, Chief Justice of the Court of

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288 The phrase appears consistently in every proceeding in admiralty reviewed, prior to the merger of the courts in 1875. It possibly became popular, if not mandatory, following the prohibitions that proliferated during the 1600s.

289 Roman law had of course found its way to England in Roman times, but the revival of the study of Roman law first came to England with the teachings of Magister Vacarius in the twelfth century. See Francis de Zulueta, *The Liber Pauperum of Vacarius* (London: Selden Society Publications, vol. 44, 1927). See also Francis de Zulueta and Peter Stein, *The Teaching of Roman Law in England around 1200* (London: Selden Society Supplementary Series, vol. 8, 1990) and Peter Stein, "The Vacarian School" (1992) 13 *J. Legal Hist.* 23.

290 It would require a more in-depth study of the Warrant Books and Act Books of Clerke's time to try to see what role he played in the High Court of Admiralty. A cursory study of the Warrant Books for the 1500s leads one to believe that entries were made by the registrar or another court officer and not yet by the claimant's proctor as in later times. Proctors made their own entries during the period under review, but not during Clerke's time, thus making more difficult the association of suits and proctors.

291 The Act Book volume in which the 1575 settlement was doubtlessly copied by the civilians would have been between volume HCA 3/16 (ending in March 1575) and volume HCA 3/17 (starting in 1576). It must have disappeared shortly after being created, which is why the more modern numbering scheme for the volumes is continuous. For a commentary on the settlement, see *Hale and Fleetwood*, *supra*, note 41, at page xcii.

Common Pleas, and later, Chief Justice of the Court of King's Bench. While Chief Justice of the Common Pleas, Coke wrote his Institutes, or comments on the laws of England.[292]

The fourth part of the Institutes included Coke's response, on the part of the common law judges, to a series of complaints made to the Privy Council by Daniel Dun, judge of the admiralty, concerning what the civilians considered to be the unlawful issuing of prohibitions, notwithstanding the 1575 settlement. The fourth part would only be published in 1648, but had been circulated in manuscript during Coke's lifetime.

Coke was very critical of the admiralty court and, among other attacks, declared it to be no court of record. Thus, he argued, the court could not receive stipulations from parties or sureties and could not condemn parties in contempt. In an answer to the complaint that the 1575 settlement was not respected, Coke simply argued that no settlement had ever been reached in 1575, and noted the absence of any reference to the settlement in any of the extant Act Books. The civilians reacted to Coke's attacks. Dun and Henry Marten, an advocate, drafted a reply, denying virtually all of Coke's assertions.[293] But the two positions were so far apart no common ground could be attained. The civilians would have to bide their time.

In 1633, a second settlement was agreed by the common law judges and the admiralty judge, Sir Henry Marten, following a debate before the Privy Council.[294] Of note, the third resolution was to the effect that "if a suit shall be in the court of admiraltie for building, amending, saving or necessary victualling of a ship against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm." Thus, a shipowner voluntarily appearing in an *in rem* suit in the admiralty could not later attack that court's jurisdiction in the King's Bench. But for present purposes what

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[292] Published in four volumes, only the first of which, *Commentaries upon Littleton*, was published during Coke's lifetime in 1628. For present purposes, the most important part is the fourth, first published in 1648. See Edward Coke, *Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of the Courts* (London: Flesher, 1648).

[293] The reply is in the National Archives at SP 16/208/508. A copy appears in *Hale and Fleetwood*, *supra*, note 41, at page 300. When the Institutes were published, civilians continued to argue with its content. See for example, Richard Zouch, *The Jurisidiction of the Admiralty of England, asserted against Sir Edward Coke* (London: Tyton & Dring, 1663). See also the comments in 1670 of Leoline Jenkins, judge of the admiralty, on one of the admiralty jurisdiction bills, in William Wynne, *Life of Sir Leoline Jenkins* (London: Downing, 1724), vol. I, at page lxxvi.

[294] The content of the debate and the terms of settlement are set out in *Hale and Fleetwood*, *supra*, note 41, at pages xcix *et seq*.

is noteworthy is the reference to taking suit against the subject vessel for necessaries or repairs to the ship.

This was not the first reference to such actions being against the subject vessel. There had been no mention of this in the 1575 settlement, but in a common law case of 1613, *Greenway v. Barker*,[295] the Court of Common Pleas was asked to issue a prohibition to the High Court of Admiralty, in a case where a defendant had been arrested and required to issue a stipulation. Serjeant Nichols, in support of the prohibition, argued that the libel in admiralty should only be against the ship, and not against the party who had been arrested. Serjeant Dodderidge argued *contra*.

Chief Justice Cook called upon two advocates, Dr. Steward and Dr. James,[296] to enlighten the bench, and although the report is somewhat confusing as to exactly what was said by whom, both doctors of law upheld the ancient power of the admiralty to take stipulations. Cook appeared to agree with the arguments on all sides, and the case was adjourned without a decision being reported. The importance of the case is the common-lawyers' concept that the ship could be liable in admiralty, but not the person, and Dr. Steward's comment that the admiralty first arrests "the goods". These comments appear to focus arrest on the wrongdoing goods, as opposed to any assets of the defendant.

During the Interregnum, legislation conferred upon the court of admiralty "jurisdiction against the ship or vessel, with the tackle, apparel, and furniture thereof, in all causes which concern the repairing, victualling, and furnishing provisions for the setting of such ships or vessels to sea."[297] These provisions did not survive the Restoration. However, the legislation reinforced the concept of *in rem* actions, at least for services rendered to ships and their owners. And during the

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295 *Greenway v. Barker* (1613), Godb. 260, 78 E.R. 151 (C.B.).

296 Francis James, D.C.L., was admitted to Doctors' Commons on October 26, 1590. See G.D. Squibb, *supra*, note 3, at page 165. However, the reference to Dr. Steward is not in Squibb's list, and might in fact have been a reference to an advocate who would have been steward of Doctors' Commons. Stewards were employees in early years, but might have been an advocate in 1613. Unfortunately, the minutes of early meetings of the college would probably have been lost in the Great Fire of 1666.

297 This vocabulary, first enacted in *An Ordinance for Settling the Jurisdiction of the Admiralty*, 12 April 1648, C. H. Firth and R.S. Rait, *Acts and Ordinances of the Interregnum* (London: H.M.S.O., 1911) vol. I at page 1120, was repeated on 23 April 1649, *ibid*., vol. II at page 78, and again on 30 July 1653, *ibid*., vol. II at page 712. Note that the concept of building a ship, referred to in the 1633 settlement, and in the later draft bills, was not included in the Interregnum legislation.

following decade, in 1663, the Attorney-General was able to say in Parliament that the civilians called this procedure *agere in rem*.[298] At the time, the civilians had not started regularly using the terms *in rem* and *in personam* in the court records, but were about to do so, as they would try to get Parliament to reconfirm the earlier conciliar settlements and Interregnum legislation.

All attempts to achieve legislation to curb prohibitions following the Restoration would eventually fail, like the conciliar efforts that preceded them, but it should be noted that the last bill actually introduced in Parliament, in the 1669-70 session of the House of Lords, again included the reference to prohibitions in suits for the building, repairing and supplying of necessaries brought directly against the subject ships. The final attempt to table a bill, upon the accession of James II in 1685, included not only a reference to suits taken against the ship for building, repairing and supplying, but also to suits taken against the ship for the wages of mariners having worked thereon.[299]

Like its predecessors, the 1685 draft instrument was never enacted, but demonstrates the progression of the *in rem* process in the short period between 1670 and 1685. Ship building and supplying suits might have been common, but associating *in rem* process to wage claims, at a time when admiralty jurisdiction was at its lowest ebb, meant that the vast majority of all admiralty suits now targeted the "wrongdoing" ship, i.e. the ship that was the subject of the action.[300]

The seventeenth century thus ended with the civilian admiralty jurisdiction facing failure. Conciliar efforts had failed. As had efforts to achieve legislative protection from prohibitions. If the admiralty's highest tide had been the settlement of 1633, and the Interregnum legislation, the court's lowest ebb would follow the Restoration of Charles and the decades that followed. The court was now surviving on wage suits and on prize captures in times of war. Admiralty process had progressed rapidly during the seventeenth century, and what was the procedure at the outset, allowing the arrest of any property of the defendant, had now become *in rem*, not only for suits involving services rendered to ships, but for all-important wage claims.

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298 See D.E.C. Yale, *Lord Nottingham's Chancery Cases* (London: Selden Society Publications, vol. 79, 1961), at page 948.

299 See *Hale and Fleetwood*, *supra*, note 41, at page cxxiv.

300 See the comments on the number of wage claims, *infra*, note 943.

And yet, doubtlessly due in part to these very changes, a market emerged for books describing admiralty procedure. But the only book available was that of Francis Clerke, written long before the changes had come about. The popularity of that out-dated treatise would be the cause of centuries of confusion amongst legislators and law practitioners in England, but also in North America.

Francis Clerke

Clerke was admitted a proctor in 1564.[301] He never attended university, but in 1594 obtained by special leave a degree of bachelor of civil law from Oxford University on the supplication that he had just written a book and he wanted to adorn his name with a reference to a degree.[302] He was referring to the first of two volumes of interest to the present enquiry. That first volume was on practice in the ecclesiastical courts.[303] The printed version, published posthumously in 1666,[304] includes a preface dated 1596.

In 1667, Clerke's second volume *Praxis Curiæ Admiralitatis Angliæ* was published as a companion to the first, containing a description of admiralty procedure.[305] This book was of enormous interest to admiralty practitioners, as it is the first English book dedicated to procedure

[301] Much of this description of Clerke, an otherwise obscure personage, comes from the very helpful book written by the prolific Sir John Baker, Q.C. for the Ecclesiastical Law Society, *Monuments of Endlesse Labours* (London: Ecclesiastical Law Society Publications, 1998).

[302] Baker, *ibid*., at page 72, points out that Clerke acted as a proctor for the university.

[303] The title of the volume varies from one manuscript to another, and even the title of the version printed in 1666 is not a simple one. See Baker, *ibid*., at page 74.

[304] Francis Clerke, *Praxis Francisci Clarke, tam ius dicentibus quam aliis omnibus qui in foro ecclesiastico versantur apprimè utilis* (Dublin: Nathaniel Thompson, 1666) [hereinafter *Praxis Ecclesiasticus*]. Baker points out that the 1666 edition, like the "much corrected" London reprint of 1684, was a corrupt text that could have been in fact corrected by reference to some of the more than 50 manuscript copies that still survive. See Baker, *ibid*., at page 75.

[305] Francis Clerke, *Praxis Curiæ Admiralitatis Angliæ* (London, William Crooke, 1667) [hereinafter *Praxis Admiralitatis*]. *Praxis Admiralitatis* was reprinted six times, including the third edition published in 1722 by Browne & Senex, in Latin and English on facing pages. Later editions bore a title referring to the High Court of Admiralty. See, for example, the fifth edition in Latin, *Praxis Supremæ Curiæ Admiralitatis* (London: Clarke & Sons, 1798) to which the articles of Master Thomas Rowghton are appended. These articles, describing the functions of the admiral, are found in the Black Book of the Admiralty, HCA 12 in the National Archives, folios 70-82 (also numbered 141-165 on recto-verso numeration) and bear the notation, at folio 81r (164), that they were translated from the French into Latin and entitled *De Officio Admiralitatis* by Master Rowghton. Rowghton's articles first appear in the fourth edition of *Praxis Admiralitatis*, edited by Sir Edward Simpson and published in 1743. According to Simpson, Rowghton, apparently from a place also called Rowghton, might have been a registrar or deputy registrar of the High Court of Admiralty. See also *Black Book*, *supra*, note 26, vol. 1, at pages xxxv and xxxvi. The fifth edition of *Praxis Admiralitatis* was somewhat expanded, including 68 titles or chapters associated to Clerke, whereas the original *Praxis Admiralitatis*, and even the bilingual third edition, only contained 63 titles.

for this part of the profession. Both volumes circulated in manuscript in Clerke's time, but were printed long after his death.[306] It would appear useful to look at some of the teachings of the *Praxis Admiralitatis.*

The *Praxis Admiralitatis* is divided into 63 titles or chapters. All chapters are applicable in admiralty cases, but many of the chapters refer to the *Praxis Ecclesiasticus* as the procedure is the same as that described for the ecclesiastical courts. This is especially true for chapters 42 to 63 which deal with proof and appeals. The first 23 chapters deal with arrest of the person in admiralty matters, with obtaining security and with how to deal with defaulting or absconding debtors. The middle section, including chapters 24 to 41, deals principally with the arrest of goods.

The first chapter indicates how an action is instituted it the High Court of Admiralty. Clerke states that anyone having a civil action against any person or goods must obtain a warrant for the arrest of the person, who is to be kept in safe custody until he has appeared. This statement is important as it appears to say that the each civil suit in admiralty requires the arrest of the defendant. Warrants, according to Clerke, do not require a judicial decree, but are issued by the registrar much as an ordinary citation in the ecclesiastical courts.[307] The warrant is served personally upon the defendant by either taking security for his appearance or taking him in custody until security is posted, failing which he will be brought before the court and committed to prison until he provides security or until the suit is adjudged.[308]

The court could allow a defendant to go free awaiting trial upon his oath in the form of a juratory caution to guarantee his appearance, especially where the defendant is poor.[309] However, should the defendant, having given a juratory caution, fail to appear on the designated day, he will then be taken into custody for his contumacy. A defendant having provided security, but who then does not appear, will equally be taken into custody and those having stipulated a bond in his

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306 The date of Clerke's death is unknown, but he could not have survived until the 1660s. There still exist more than 50 manuscript copies of *Praxis Admiralitatis*.
307 *Praxis Admiralitatis*, c. 2.
308 *Ibid*., cc. 3 and 5.
309 *Ibid*., c 5.

favour will forfeit the full amount to the court.[310] It is to be noted that security in this sense is solely to ensure that the defendant will appear as required by the warrant. Should the plaintiff fail to appear, the defendant may obtain an order dismissing the suit, but more often the court will issue an order for costs and decree that the plaintiff shall appear on a designated court day, failing which the suit will be dismissed.[311]

Where the proctors for the parties appear, they are to pray act of their procurations or powers of attorney, and each will then pray that the other provide security, not only for the due prosecution of the suit or for the defence and appearance as may be required, but also for the payment of the sum claimed with costs.[312] All stipulators are subject to protest and to contestation should the other party be able to prove that the security is insufficient or the stipulator insolvent.[313]

Clerke informs us that once security is in place, the suit proceeds in a summary manner, along the lines of the proceedings in the ecclesiastical courts, whereby the plaintiff files a libel, the court sets a probatory term for the examination of witnesses out of court, the court then orders the publication of the evidence taken out of court, the parties are heard and a decree issued.[314] But most of Clerkes comments and chapters concern what happens if one or the other party fails to adhere to the rules or fails to appear or provide security. In this sense, the *Praxis Admiralitatis* is more of a practical problem solver than a doctrinal overview of pleading. There are chapters about how to respond should the defendant not produce answers to the libel,[315] how to react where the sureties do not produce the party following the original appearance,[316] or where the party or a witness does not appear for an examination.[317]

It is not until chapter 24 that Clerke finally discusses the arrest of goods. He confirms that in the preceding chapters he was concerned with the personal arrest of the defendant. He states that where a defendant is out of the kingdom, or if he absconds, then any of his goods, merchandise

310 *Ibid*., c. 8. Clerke suggests that the court might allow to the claimant a reasonable portion of the value of the bond to compensate for the delay incurred.
311 *Ibid*., c. 9.
312 *Ibid*., cc. 11 and 13. Clerke notes that where the plaintiff claims a larger sum than might be reasonably due, the court can reduce the amount of security that the defendant is required to provide.
313 *Ibid*., cc. 12, 14 *et seq*.
314 *Ibid*., c.18.
315 *Ibid*., c. 19.
316 *Ibid*., c. 21.
317 *Ibid*., cc. 22 and 23.

or ships can be arrested regardless of who has possession thereof.[318] The debtor is to be cited specially and generally, as are all others who may pretend to have any interest in the goods arrested. But to arrest goods, the plaintiff must first allege the contumacy or default of the defendant.[319] It would follow that, in Clerke's time, the plaintiff could not arrest goods where a defendant appeared. Alleging the defendant's contumacy involved citing the defendant who, if he failed to appear, would incur a series of defaults.

Where the arrest is of goods belonging to the defendant, but in third-party hands, the person alleged to be in possession of the arrested goods must appear and may make a negative declaration alleging that the goods are not and were not, at the time of the arrest or since, in his possession or that they were, but did not belong to the defendant. If contested, separate proceedings may follow to determine this point.[320] The third party may also admit possession but oppose the arrest, and allege his own right to possession or title to the goods, in which case the third party must intervene and the separate issue of possession or title will need to be determined.[321]

Absent such interventions, Clerke explains that following the fourth default of the defendant for contumacy, the plaintiff proves his case by providing evidence of the debt and thus proceeds to obtain the first decree, which places the plaintiff in possession of the goods arrested to the extent they cover the debt and, should they be of a higher value, they will be ordered to be appraised and sold, preferably one year after the first decree, unless they are perishable.[322] The delay is due to the fact that goods could be recovered by their owner within one year of the first decree, but where the goods have been sold prior to the intervention, the value obtained from their sale can be the object of the recovery.

What conclusions can be drawn concerning the role of arrest in late sixteenth century admiralty practice? The first is the overarching importance of providing security. Security for appearance avoids the arrest of the defendant. Security for the claim avoids the arrest of goods. Absence of

318 *Ibid*., c. 24.
319 *Ibid*., c. 27
320 *Ibid*., c. 30.
321 *Ibid*., cc. 38 and 39.
322 *Ibid*., c. 31

security leads to contumacy, and to the arrest of the defendant, or, where he cannot be found, of his goods in the hands of whosoever might have possession.

Some authors have noted the late mention by *Praxis Admiralitatis* of the arrest of goods.[323] But chapter 1 of the *Praxis Admiralitatis* starts by stating that anyone who has a maritime claim against a person or against goods (*contra personam aliquam et contra bona*) must obtain a warrant accordingly. The fact that the following 22 chapters leave the arrest of goods aside is of little significance, as chapter 24 comes squarely to the issue of arresting goods.

What is more important is that the arrest of goods appears to Clerke as the solution to the absent defendant or the absconding defendant. Then, any of his goods, including but not limited to maritime goods such as ships or cargoes, can be arrested. There appears to be no requirement that the goods be related to the cause of suit, such as being the instrument of the damage or the debt. The arrest of goods is simply a means of compelling the defendant to appear and provide security or, failing appearance, of securing the eventual decree by the goods arrested. This is the source of Jeune's procedural theory of *in rem* process in *The Dictator*.[324]

Clerke is careful in his use of the vocabulary of each step of the arrest and execution, but not once does he use the term *in rem* or *in personam* to describe a suit against the person of the defendant or against his assets. It is certain that these terms were familiar to Clerke as they are, as has been seen, common Roman law terms. But it is clear that Clerke does not give a special admiralty sense to these terms. Surely, had he done so, he would have mentioned their use, as these terms were not related to arrest in Roman law, but rather to the nature of the action as seeking possession of or title to goods, as opposed to seeking redress against the person of the defendant.

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323 Which is not described until chapters 24 *et seq*. See *Hale and Fleetwood*, *supra*, note 41 at xli, n. 1.

324 See the text accompanying note 19 above. That Clerke is correct in his description of arrest of any of the defendant's assets is confirmed by Marsden in *Select Pleas I*, *supra*, note 41, at pages lxxvi and lxxii, where he states that there was scarcely a trace of arrest being founded on a maritime lien. Marsden does not expound on the concept of maritime liens, which were only recognized as something specific to admiralty claims by the judges of the common law courts in the middle of the nineteenth century. See *The Bold Buccleugh* (1851), 7 Moo. PC 267, 13 E.R. 884 (P.C.).

In Hall's annotated edition of the *Praxis Admiralitatis*[325] the additional comments on this chapter[326] state that the arrest of goods is in the nature of a foreign attachment as practiced in the municipal courts of London. Attachments akin to foreign attachments are still popular in the United States.[327] However, as shall be seen, although the municipal attachment remedy continued for some time, any similar remedy had disappeared from English admiralty practice long before the beginning of the nineteenth century when Hall's edition was in preparation.

Clerke describes the arrest of the person of the defendant as the principal remedy for his contumacy. Prichard and Yale conclude that the arrest of property in Clerke's time only played a subordinate role to the arrest of persons and that "there seems no reason to doubt" that the priority of personal arrest would have been usual since the inception of the court in the mid-fourteenth century.[328] And yet Roman law, and the European *Ordo Judiciorum*, required contumacy prior to any seizure remedy, which would thus be contrary to the customary practice of the admiralty in Clerke's day.

Prichard and Yale note that the defendant's property could be arrested in a "pre-emptive strike" at the outset of the action, at the same time as the defendant was first personally cited, and thus could not be caused by his contumacy, but find the most "compelling" explanation to be that the most common property arrested, a ship, could be removed from the jurisdiction *velo levato*, leading them to further conclude that "there seems no reason to doubt" that immediate arrest featured in the admiralty from the inception of the court.[329] They note the "ambivalent" nature of admiralty arrests, having the effect of citing a contumacious defendant to appear, while at the same time placing upon the arrested ship or property the liability for the incident or contract that effectively binds the property for the transaction giving rise to the plaintiff's claim.[330]

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325 John E. Hall, *The Practice and Jurisdiction of the Court of Admiralty* (Baltimore: Dobbin & Murphy, 1809).

326 *Ibid*., at 60. Hall assigns the chapter number 28 to what was originally chapter 24 in the *Praxis Admiralitatis*, as he is translating the fifth edition, published in Latin in 1798, which added five chapters. See *supra*, note 305. Hall also adds additional comments that were not in the fifth edition, especially concerning American maritime law and practice.

327 Federal Rules of Civil Procedure, Admiralty Supplementary Rule B. See also the text accompanying note 398 below.

328 *Hale and Fleetwood*, *supra*, note 41 at page xli.

329 *Ibid*., at page xlii.

330 *Ibid*., at page xlix.

But before concluding that the *Praxis Admiralitatis* is an accurate description of admiralty practice at the end of the sixteenth century when it was written, or at the end of the seventeenth century when it was being reprinted, two caveats must be noted. First, Clerke never lived to endorse the proliferation of the manuscript copies of the *Praxis Admiralitatis*, let alone to see the first edition in print in 1667[331]. The publication of the *Praxis Ecclesiasticus* was, as Sir John Baker notes, intended for the use of students[332] and nothing suggests the *Praxis Admiralitatis* was intended for a more learned audience. However, by the end of the seventeenth century, the *Praxis Admiralitatis* had survived two editions and at least five more would follow during the period under review, so its influence was certain.[333]

Secondly, can the *Praxis Admiralitatis* be seen as an authoritative text? Baker suggests the *Praxis Admiralitatis* was popular for want of any serious competitor,[334] and no one seems to have undertaken a modern edition comparing manuscript copies extant, or to have cross-checked Clerke's assertions in the records of the High Court of Admiralty, including the Warrant Books or Act Books of Clerke's time, to see whether the arrest of goods belonging to the absent or absconding defendant was in fact the norm or the exception.[335]

Edward Simpson

Treatises on admiralty procedure in England following the publication of Clerke's work were not legion. However, a manuscript volume in the British National Archives contains the work of Sir Edward Simpson. A civilian admitted to Doctors' Commons on May 10, 1736, Simpson was

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331 Baker suggests that the limited number of potential buyers might have made printing the *Praxis Admiralitatis* in Clerke's lifetime too uncertain a venture to undertake. See Sir John Baker, *Monuments of Endlesse Labours supra*, note 301, at page 74.

332 *Ibid*., at page 74.

333 These include the English editions of 1667, 1679, 1722, 1743, 1798 and 1829, as well as Hall's American edition of 1809, *supra*, note 325. See *supra*, note 305.

334 Baker, *supra*, note 301, at page 73.

335 The Act Books, series HCA 3 in the National Archives, commence in 1524, and the Warrant Books, series HCA 38, in 1541. The only earlier admiralty cases extant include two admiralty cases from the 1390s published by Marsden, *Sampson v. Curteys* and *Gernesey v. Henton*, found amongst the Chancery records, where *certiorari* had been sought. See *Select Pleas I*, *supra*, note 41, at pages 1 and 17. A third admiralty court case dating from 1361 was later found amongst the Chancery records. See *Smale v. Houeel*, published in (1929), XV *Camden Society Miscellaneous Publications* 1 under the title "An Early Admiralty Case". This third case was found after Marsden had written his Selden Society volumes and would appear to be the earliest English admiralty court decision extant. The *Black Book*, *supra*, note 26, contains references to two cases that would have been handed down in the 1440s, but no official records from these dates exist. See *Hale and Fleetwood, supra*, note 41, at page xli.

appointed King's Advocate in 1756 and died in 1764.[336] Henry Bourguignon has authoritatively established that the manuscript is related to Simpson.[337] Bourguignon's description of the manuscript needs little further comment.

The Simpson manuscript is in fact a copy of a manuscript that was in the possession of Lord Stowell, but Bourguignon has demonstrated beyond doubt that the original manuscript was not created by Stowell and was in fact made in the middle of the eighteenth century when Stowell would have been a child.[338] References to Stowell's description of a manuscript prepared by Simpson confirm that the manuscript in the archives is a copy of that prepared by Simpson. A note at the beginning of the existing copy indicates that the registrar of the High Court of Admiralty in Stowell's time, William Rothery, would have had the copy made.

The manuscript is in two sections. The first section of 70 pages is a commonplace book for the High Court of Admiralty. The second section of over 300 pages is an expansion of the first section with numerous points of law mentioned under well over 100 headings ranging from Actions to Wreck. The headings are partially arranged alphabetically but the author has, over time, been obliged to skip from one title to another and provide cross references to entries continued on or from other pages.

The manuscript covers virtually every aspect of admiralty law, including instance and prize jurisdiction, but is not an easy read, in that the entries are jumbled throughout the book. As Bourguignon points out, no competent civilian in his right mind would have copied this manuscript in the same order as the original, and Bourguignon concludes that it was copied at Rothery's request by different copyists who knew nothing of what it contained and simply copied each page as in the original.[339]

The manuscript makes hundreds of references to another manuscript, identified as "A", a document which Bourguignon was unable to locate. This other manuscript would be an

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336 See G.D. Squibb, *supra*, note 3, at page 190. Simpson was president of Doctors' Commons from 1708. His portrait hung opposite the judge's bench in the court room. See Squibb at pages 74 and 117. Simpson published the 1743 edition of *Praxis Admiralitatis*. See *supra*, note 305.

337 Henry J. Bourguignon, *Sir William Scott, Lord Stowell* (Cambridge: Cambridge University Press, 1987) at pages 286-293. The manuscript is HCA 30/1042 in the National Archives.

338 *Ibid*., at page 290.

339 *Ibid*.

admiralty sourcebook, probably created by Simpson as well, although it could have been created by another civilian. It is, as Bourguignon points out, sad that the Simpson manuscript is the sole admiralty "treatise" from the middle of the eighteenth century.

For present purposes, it is noteworthy that there are a dozen headings in the Simpson manuscript concerning procedure, including actions, arrest and prohibition, each of which contains several entries. Although these and several other headings, such as wages, refer repeatedly to arrest, in no entry is there a reference to the possibility of arresting any property belonging to the defendant, whether related to the suit or not. The Simpson manuscript is in this sense much more modern than the *Praxis Admiralitatis* which indicates that in the sixteenth century arrest was solely to punish the contumacious defendant and could include any of his property, maritime or otherwise.[340]

However modern the Simpson manuscript is, in content if not in style, it is also noteworthy that the terms *in rem* and *in personam* are once again totally absent from the civilian vocabulary contained therein. The arrest of ships, cargoes and persons was well known to admiralty practitioners, but one needs to come to the end of the eighteenth century and the beginning of the nineteenth before these terms becomes commonplace in admiralty doctrine.

Arthur Browne

Browne, an Irish civilian, obtained a BA degree at Trinity College in 1776 and was admitted to the Inner Temple three years later. Instead of London practice, he returned to Dublin to obtain an LL.B. in 1780 and an LL.D. in 1784.[341] For the ensuing 20 years, Browne practiced admiralty law in Dublin, taught civil and admiralty law at Trinity College, and served in Parliament for 17 of those years. Not to mention that he converted his lectures into his famous treatise on civil law and admiralty.

Browne's treatise sets out the practice of the courts of admiralty in civil suits by first giving a personalized overview of the conduct of a suit in Roman law.[342] He points out that the admiralty

[340] See the discussion of the *Praxis Admiralitatis* above. This state of affairs was possibly still in force well into the seventeenth century, based on the number of editions of the *Praxis Admiralitatis* that were published.

[341] For a recent biography of Browne see Joseph C. Sweeney, *The Life and Times of Arthur Browne in Ireland and America, 1756-1805* (Dublin: Four Courts Press, 2017), especially at pages 57-61.

[342] Browne, *supra*, note 195, vol. 2, chapter VIII.

courts are the sole courts in England and Ireland that adhere to Roman law procedure without exception, the ecclesiastical courts having to submit by precedence to the canon law.[343]

Browne states that a suit originally began in Roman law by the citation or the arrest of the defendant and, should the defendant hide in his house, by the seizure of his chattels.[344] But the assertion is questionable and, as has been seen, at least by Justinian's time, the corporal arrest of the defendant was limited to crimes, and the concept of contumaciousness had come to be the device to force a defendant to appear. A contumacious defendant was subject to losing possession and eventually title to goods in real actions and possession in personal actions.[345]

With regard to security, Browne states that in Roman law, where both parties appeared, each was to give security, the plaintiff for costs in case he lost the case and the defendant to pay the amount adjudged against him.[346] Where a defendant could not obtain security, a juratory caution could be allowed as a substitute. Once security provided, the parties filed pleadings in writing, a libel from the plaintiff and defence from the defendant.[347] But this assertion of security is of questionable accuracy. Rather, Roman law security in personal actions was for costs alone.

Browne explains at length the use of *exceptions* in Roman law proceedings, which he differentiates from *defences*, the latter taking away the plaintiff's claim and the former avoiding the claim.[348] Thus a plea of *res judicata* would be an exception, but a plea of payment and satisfaction would be a defence. Exceptions were of a peremptory nature, where the claim would thereby come to an end, or of a dilatory nature where they resulted in delay only.

Once the defendant had entered his plea, the plaintiff replied. Thereafter in Roman law there could be further exchanges of rejoinder and rebuttal called *duplicatio*, *triplicatio* and

343 *Ibid*., at page 348.
344 *Ibid*., at page 349.
345 *Ibid*., at page 352.
346 *Ibid*., at page 357.
347 Browne makes the distinction between the general denial in Roman law contesting the suit altogether and personal answers of the more modern civil law, setting out the precise position of the defendant to each of the points of claim. *Ibid*., page 358.
348 *Ibid*., at pages 362 *et seq*.

quadruplicatio. Once the parties were at issue, the issue was transacted in *judicio* and the prætor was ready to send the case to the *judices* or jury.[349]

Browne states that in Roman maritime law, it is said that not only is the shipowner answerable for the contracts of the master, but also the ship itself, and that the ship might be arrested until bail was given.[350] But he concedes being unable to find any authority for the assertion, which is also questionable.

Browne then turns to the rules of evidence, reaffirming the Roman law rule that no man shall be a witness in his own cause.[351] But other persons could of course testify, and Roman law usually required two witnesses for each fact to be proven.[352] Browne questions the Roman origins of the civil law rule, applicable in the civil law courts of his day, that witnesses were to be examined in private or secretly.[353]

More to the point for present purposes, Browne sets out the principles of Roman law procedure as they were applied in the English and Irish admiralty courts. He notes that Clerke's *Praxis Admiralitatis* gives precedence to proceedings against the person, only mentioning proceeding against the person's assets where the person is found to be contumacious. Browne, using more modern admiralty vocabulary, begins with a description of *in personam* process and later discusses *in rem* process.

Browne's statement would have been more accurate, had he said that Clerke discusses proceedings against persons and, in cases of their contumaciousness, against their assets. As seen above, Clerke does not use the more modern terms, probably because the admiralty concept of differentiating between *in personam* actions against defendants and *in rem* actions against their assets had not yet matured in the late sixteenth century. In fact, Clerke never once discusses suits

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349 *Ibid*., at page 369.
350 *Ibid*., at page 35.
351 *Ibid*., at page 371. Browne sets out in a footnote his reasons for assuming that personal answers to positions or allegations of the plaintiff were never part of Roman law or procedure. They were added by canonistic process at a much later date.
352 *Ibid*., at page 380. See also D.22.5.12. Otherwise the evidence of one witness was only considered to be half proof, but there were exceptions to this rule. *Ibid*., at page 385.
353 *Ibid*., at page 382.

against objects as having a liability of their own, but only discusses suits against any asset of the contumacious defendant.

Browne states that proceedings *in rem* commence with the issuance of a warrant of arrest, which also contains a citation to the master in particular, and all others having an interest in the ship in general, to appear in the action.[354] The warrant was traditionally issued by the court officials upon a mere request of the plaintiff's proctor, but Browne points out that on January 28, 1801, the admiralty judge, Sir William Scott, later Lord Stowell, ruled that from then on, an affidavit of the debt would be required prior to issuing the warrant.[355] Once executed, the warrant was served in admiralty by producing the original to the master and affixing a copy on the property to be arrested.

Browne states that *in rem* actions generally arise where suits are for seamen's wages, for hypothecation or bottomry bonds, for possession of ships amongst part owners, and for collision damages. He states that suits may be against the ship or against the person where claims are for assault and battery, commonly called damage actions, for amounts held as freight or proceeds of the sale of a ship or cargo, or for ransom relief.[356] This statement is somewhat confusing, as Browne states unequivocally that suits for wages can also be against the master or owner and that the same would apply to suits for hypothecation, possession or collision damages.

In other words, Browne affirms that suits for all of the above claims could be made *in rem* where the ship, cargo, freight or proceeds of sale are "to be had", but otherwise *in personam* against the

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354 *Ibid*., at page 398.

355 *Ibid*., at page 402. This was not necessary for cases of derelict vessels, where the claim was based on a droit of admiralty. The order appears in Sir James Marriott, *Formulare Instrumentorum or a Formulary of Authentic Writs* (London: Bickerstaff, 1802), at page 31.

356 *Ibid*., at page 396. Prior to 1782, vessels taken as prize by enemy privateers could be released on the issuance by the master of a ransom bill, whereby the owner was to pay to the privateer an agreed amount of money. To secure payment, members of the crew would be held hostage by the privateer. The *Ransom Act*, 1782 (U.K.), 22 Geo. III, c. 25 outlawed the practice. At least one hostage seems to have survived the enactiment. Mr. Yates had been a mariner on the British ship *Saville*, captured by Edward Macatter, privateer and commander of the American vessel *Black Princess* on May 29, 1780 during the American Revolutionary War. Yates remained a hostge until 1783, when the proceeds of the sale of the *Saville* were paid to the captors. The debate had been whether the owners were liable beyond the value of the ship, up to the full value of the bill. The question was again raised by Yates who now claimed his wages over the three-year period of captivity. The High Court of Admiralty and the Delegates decided against Yates, affirming that the sale of the vessel released the owner from all other liabilities. But an action in the Court of King's Bench for the wages succeeded, Lord Mansfield declaring that, even in absence of authority, the mariner who was the means of obtaining the liberty of the rest of the crew was entitled to his wages. See *Yates v. Hall* (1785), 1 T.R. 73, 99 E.R. 979.

master, owner, perpetrator of the assault or holder of the freight or proceeds of sale.[357] Should the owner or master appear voluntarily and enter a stipulation, the court will thereafter have personal jurisdiction over the person appearing.[358] Failure to appear, according to Browne, leads to proceedings for default. Browne defines default for *in rem* proceedings as an absence of any person cited to appear.

The warrant having been served, the personal defendants cited to appear are thus called upon in open court four separate times, and, failing appearance, are found to be in contumacy. On the fourth and final default, the proctor for the plaintiff produces or *porrects* a summary petition which results in the *first decree* being issued by the court.[359] In Roman law, the first decree placed the plaintiff in possession of the *res* in a real action and, in a personal action, allowed the plaintiff to take possession of the assets of the defendant for the benefit of all creditors.[360] In Roman law the *res* in a real action was the subject of a proprietary dispute, the plaintiff alleging his right thereto.

However, Browne points out that, in admiralty, the first decree only places the plaintiff in possession to the extent of his debt if the value of the *res* is sufficient and, if not, as far as their value, which means the sale of the *res* will be necessary to determine what effect the proceeds will have on the debt of the plaintiff.[361] The plaintiff must give security to answer any person claiming a right or intervening and alleging an interest in the *res* within one year of the first decree.

Browne confirms that in Roman law, the first decree was followed by a second decree, one year following the first, whereby title to the contested property was transferred to the plaintiff and, in personal actions, the assets in the plaintiff's possession were sold for the benefit of all creditors. Browne points out that in an admiralty action *in rem*, the second decree is unnecessary, the lapse

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357 *Ibid*., at page 397. Browne nuances between the liability of master and owner in collision cases. He states that the suit against the master is *in solidum* and thus for the full value of the damages, even if beyond the value of the ship, presumably because the master is in charge of navigation, whereas the owner will only be liable beyond the value of the ship where it can be shown that the owner somehow rendered himself specially liable for the collision.

358 *Ibid*., at page 399.

359 *Ibid*., at page 401.

360 *Ibid*., at page 352.

361 *Ibid*., at page 402.

of a year producing the effect of a second decree.[362] However, given the perishable condition of any unmanned ship, Browne points out that the usual manner of proceeding against ships *in rem* is to obtain a perishable monition, allowing the court to issue a commission of appraisement and sale of the ship immediately following the first decree.[363] In this case, the proceeds of sale are paid into court, to be paid out one year following the first decree.

Browne sets out the various requirements of security that are required to allow an admiralty suit to proceed. Where a person is arrested, bail must be provided to ensure that he will appear in court.[364] Assuming the defendant to appear, the plaintiff must produce security for the prosecution of the suit and for any costs that may be adjudged against him, in order to prosecute a contested action. However, more importantly, the bail provided to ensure the appearance of the defendant being accomplished, further security from the same or additional sureties is required from the appearing defendant, not only to pay costs, but to pay any amount adjudged against him. Browne refers to both types of security as fidejussory security.[365]

Fidejussory security in admiralty required the oath of two or more sureties or fidejussors entering into a bail bond before a notary public. The ultimate security would be for the amount of the claim plus costs. The court could allow only one fidejussor to be required and, in cases where the defendant is poor, could allow the defendant to swear his own security in the form of a juratory caution. In each case, fresh security would be required where there is an appeal to a higher court.[366] The opposite party could contest the sufficiency or solvency of a fidejussor, and the court would then decide whether the security is sufficient. The fidejussors will require the party

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362 *Ibid*., at page 403.

363 *Ibid*., at page 404. Browne differentiates the case of a suit for possession only, usually involving a dispute between part owners. The normal solution in such cases is to appoint a ship's husband to operate the ship during the proceedings.

364 Clerke describes bail in various titles of his *Praxis Admiralitatis*.

365 See *Praxis Admiralitatis*, titles 12 *et seq*. and Browne, vol. 2, at page 407. As noted above, Roman law did not differentiate between security for appearance and security for judgment. Only the latter was required where a defendant was contumacious. The records of the admiralty courts during the period under review in Quebec and in London do not include references to security for the appearance of the defendant, but security for the payment of the claim includes the obligation to see that the defendant appears whenever summoned by the court. The providing of separate security to ensure the defendant's appearance appears to have been the practice in Dublin, and might at some point have been in London as well, although does not appear to have been common in Quebec.

366 Browne, vol. 2, at page 410.

for whom they offer to act to sign counter-security for double the sum secured.[367] However, the fidejussor does not engage the liability of his real property in entering into the security.[368]

Browne points out that where a ship or other *res* is arrested and the value thereof exceeds the amount claimed, the only personal security that should be requested of an appearing defendant would be for costs.[369] This is assuming that the *res* remains under arrest. Where the defendant owner wishes to obtain the release of his ship, he would provide fidejussory security, much as when a defendant is arrested. The ship is then released as there is no requirement for further security and the action continues against the personal defendant.[370]

This raises the question of the sufficiency of security where, for example, the claim is introduced for an amount representing only a fraction of the value of the ship, but judgment results for an amount greater than the amount of security.[371] It has been held that where a *res* is arrested and security given, the *res* cannot be re-arrested in the same or in a fresh action where the compensation required is found to exceed the bail given.[372] It would appear that, in Browne's practice, such cases were rare, as the amount of the action was usually rounded up to an amount that exceeded the likely outcome.[373]

Stipulations were conventional instruments, although Browne suggests that the initial bail, to ensure that an arrested person appear, was official or prætorian, giving the court jurisdiction to order it to be paid. Otherwise, separate proceedings were necessary to obtain payment from

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367 *Ibid*., at page 411 and *Praxis Admiralitatis*, title 18. Clerke states that the sum is set at the discretion of the judge but it would only appear to be in rare cases where the court would be involved in the requirement of counter-security as, presumably, the fidejussor would only agree to be involved in security where he accepts the conditions thereof.

368 *Ibid*., at page 410.

369 *Ibid*., at page 410.

370 *Ibid*., at page 412.

371 As in *The Dictator*, [1892] P. 304, 7 Asp. M.L.C. 251 (Adm.).

372 See *The Kalamazoo*, (1851), 15 Jur. 885. A more recent case is *Alpha Trading Monaco SAM v. The Sarah Desgagnés*, 2010 FC 695, per Harrington, J., confirmed, 2011 FCA 41.

373 The amount on the affidavit filed at the outset, at least since 1801, was copied in the Warrant Book or Action Book and was often the generic sum of £500, even in claims for wages.

fidejussors.[374] Browne points out that, even in his day, notaries public were careful not to have stipulations sealed in order to avoid an order of prohibition from the common law courts.[375]

Browne explains that all proceedings in admiralty are summary, as opposed to more formal plenary proceedings in the ecclesiastical courts.[376] In summary proceedings, the plaintiff files a libel to which the defendant responds by filing an answer. The answer may vary, depending on the position of the defendant. He might confess or deny liability and, in the latter case, might file a general denial or dilatory or peremptory exceptions, or he might file a defence responding to the individual points or positions of the libel.[377]

If in Roman law, the plaintiff could rebut or respond to the answer and the defendant could surrebut in duplications, triplications and quadruplications, the summary process of admiralty usually kept such pleadings to a minimum. However, summary process did not prevent the admiralty courts from allowing a party to demand the personal oath of his adversary in answer to any pleading.[378] Failure to reply could lead to the citation and arrest of the party cited to answer, and even to the arrest of the sureties should they fail to produce the defaulting party into court.

In the admiralty courts, witnesses were produced by the parties during the probatory term. Browne explains the method of examining and cross-examining witnesses, both within the realm of the court and upon commission for witnesses abroad.[379] He refers to earlier treatises on ecclesiastical law practice.[380] In general, witnesses were questioned upon written interrogatories submitted by both parties. The court in principal puts the questions to the witnesses and takes their answers under oath in writing. However, in fact the registrar questioned the witnesses and

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374 Browne, vol. 2, at page 412.

375 *Ibid*., at page 412. According to Browne, the admiralty court had no juridiction over sealed contracts. *Ibid*., at page 96.

376 *Ibid*., at page 413.

377 *Ibid*., pages 414 *et seq*. Browne explains in detail the nuances of each type of plea.

378 *Ibid*., page 417.

379 *Ibid*., pages 420 *et seq*.

380 Especially Thomas Oughton, *Ordo Judiciorum* (London: privately printed, 1738). This volume in Latin on ecclesiastical procedure is not to be confused with the manuscript given the same name by Twiss in *Black Book*, *supra*, note 26. See the text accompanying note 223 above. Oughton, a proctor, had written his text, but it was lost in a fire at the printers. In what has been called an enviable display of self-composure and determination, Oughton re-wrote the entire work, a task requiring 15 additional years of work. See Baker, *Monuments of Endlesse Labours*, *supra*, note 301, at page 89. See also Holdsworth, *A History of English Law*, *supra*, note 4, vol. XII, at page 616. For an English translation of Oughton's work, see James Thomas Law, *Forms of Ecclesiastical Law*, 2nd ed. (London: Benning & Co., 1844).

their written replies were later repeated before the judge in open court.[381] What was particular about civil law practice was the *in camera* nature of the taking of testimony. The parties and their proctors were not in the room when the registrar put the questions to the witnesses and recorded their answers.

In Browne's admiralty practice however, the proctors were present in many wage cases, due especially to the large number and summary handling of such cases. Witnesses could be heard *viva voce* and cross-examined as at common law in any case where amounts in issue were small or, where time was of the essence, such as where a ship was sailing on short notice. Whether the parties were present or not, the questions were to be put to the witnesses in writing and produced in court, although this was again not always done in summary matters such as wage cases. In normal civil law practice, following the probatory term and when no more witnesses were to be heard, the parties would seek publication, that is the release of the written answers to interrogatories.

Parties could object to a witness at various stages of the process. Witnesses were sworn in open court prior to being deposed, and the adversary could protest the capacity of the witness to testify at that time. Following publication and review of the replies given by the witness, the party could object to the witness having been produced, either in general, for bias for example or, in special, to particular answers where for example they were contradictory to another oath of the same witness. A general exception would allow the other party to request an oath of calumny from the objecting party, affirming that his objection is not of a dilatory nature.

In all cases, the admiralty court was to determine the objections and the producing or *excipient* party could produce other witnesses to corroborate the testimony, whereas the contesting party could produce other witnesses reprobatory of them.[382] Following publication of all witnesses, the parties were cited or assigned to appear for the hearing of the evidence read and the arguments of counsel and the pronunciation of the sentence of the court.

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[381] Oughton explains that the court actually was to hear a verbatim reading of the written testimony before asking the witness to confirm its truth to the court, but in practice the court would ask that they be taken as read. This was to take place immediately following the deposition, and before the publication of the testimony.

[382] Browne, vol. 2, at pages 425 *et seq*.

Once the sentence was pronounced, the parties had a right of appeal which, in Browne's time was to the High Court of Admiralty from the vice-admiralty courts, and from the High Court of Admiralty to the High Court of Delegates.[383] Here again fresh security was required.[384] The delegates were appointed by the Lord Chancellor on a case-by-case basis and the proceedings were summary. The delegate judges issued an *inhibition* to the judge of the High Court of Admiralty to have the process stopped and the file copied and transmitted to the Court of Delegates in the form of an appeal book. The inhibition also contained a warrant to arrest the respondent, who then had to again provide fresh security. The security of a party before the High Court of Admiralty did not respond to the proceedings on an appeal, but would remain liable to respond to the final judgment once the delegates handed down their decision, as it would be remitted to the High Court of Admiralty and would confirm or subsume the decision under appeal as a judgment of that court.

In his description of admiralty procedure, Browne describes *in personam* proceedings as being virtually identical to *in rem* proceedings, but the arrest is of a person, usually the master or owner of the ship or the crew member having caused the damage, as in cases of assault and battery.[385] Where the arrest is within 20 miles of London, the warrant is executed by the marshal and beyond that limit by a deputy. The person arrested is detained until he provides fidejussory caution, exactly as in a proceeding *in rem*.

Thus Browne considers that where a person appears voluntarily, not to defend himself, but to defend the *res* which may be his property, the action is *in rem*, but where the remedy chosen is against the person directly, the action is *in personam*. Browne makes no general comment as to which process should be pursued. However, in his review of admiralty jurisdiction over contracts, Browne states that "the general rule however at present, is that the admiralty acts only *in rem*, and that no person can be subject to that jurisdiction but by his consent, expressed by his

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383 *Ibid*., pages 435 *et seq*. The regime changed in 1833 with appeals from the High Court of Admiralty thereafter going to the Privy Council. See the *Judicial Committee Act, 1833* (U.K.), 3 & 4 Will. IV, c. 41. For a full discussion of the jurisdiction and process of the High Court of Delegates, see G.I.O. Duncan, *High Court of Delegates* (Cambridge: Cambridge University Press, 1971).

384 *Ibid*., at page 437.

385 *Ibid*., at page 432.

entering into a stipulation."[386] It is unclear whether this comment applied in any other type of admiralty claim.

Perhaps the most astonishing affirmation Browne makes, is when he states that where admiralty process is issued against a foreign defendant, an "ancient proceeding" in the admiralty court provided a remedy analogous to the foreign attachment of the charter of the City of London, allowing any property of the foreign defendant to be arrested to compel his appearance.[387] Browne laments that this "salutary practice" had "in latter times" gone into disuse in England.[388] But was this practice a foreign attachment?

Foreign Attachments

Foreign attachments before the Lord Mayor's Court in the City of London were not part of the common law, as they never existed outside of the city, but were rather based on a municipal custom available in that court alone. Like *in rem* process, their origin has been said to be Roman law[389] but, as has been seen, there is really no record of attachments of this nature in Roman law or procedure. It is a custom said to have been confirmed by William the Conqueror, but that refers to William's confirmation of the customs and charters of London generally, without establishing that foreign attachments existed at the time.[390] Some authors suggest the practice pre-dated the Norman Conquest.[391] Similar customs were observed in France and in other English cities such as Exeter, Lancaster and Bristol[392] but the main use of the custom was in London. Foreign attachments have fallen into disuse since the 1881 decision of the House of Lords in *London Corporation v. London Joint Stock Bank*.[393]

In London, the foreign attachment was a unique process whereby a plaintiff could attach property belonging to his debtor, the defendant, in the hands of a third party, the garnishee. The

386 *Ibid*., at page 100.
387 *Ibid*., at page 434.
388 *Ibid*., at page 435.
389 See John Locke, *The Law and Practice of Foreign Attachment in the Lord Mayor's Court* (London: Sweet, 1853), at page 1. Locke cites the first edition of Joseph Story, *Commentaries on the Conflict of Laws* (Boston: Little Brown, 1834) at section 549, but Story does not justify the Roman law origin.
390 *Ibid*., at page xiii.
391 Woodthorpe Brandon, *A Treatise upon the Customary Law of Foreign Attachment* (London: Butterworths, 1861) [hereinafter Brandon], at page ix.
392 U.K., H.C., *Report of the Commissioners appointed to enquire into the existing state of the City of London* (c. 1772, 1854), at page 186. For French arrest cities, see the text accompanying note 275 above.
393 *London Corporation v. London Joint Stock Bank*, (1881), 6 App. Cas. 93 (H.L.).

Lord Mayor's Court had concurrent jurisdiction with the superior courts of common law for claims within the city. As in French arrest cities, the process was not served on the defendant prior to the attachment, in order to avoid the sale or removal of the assets by the defendant prior to their being attached. More than one attachment could be made if the attached property was insufficient to secure the debt.

The purpose of a foreign attachment was to compel the appearance of the debtor through the distraint of his property and, in default of such appearance, the sale of the property to pay the judgment. It was available on an action in debt, but its nature was equitable, somewhat like a modern Mareva injunction or freezing order, in that it was an order to the garnishee to retain the goods or moneys owed to the defendant.[394] If the defendant appeared, he would be required either to provide security or to render himself to prison, and in either case, the attachment would be released.

But most often no such appearance would take place, and the property would serve as security. It was not a perfected lien, but where judgment was obtained against the defendant, it became a specific charge on the attached property and could not be defeated by a subsequent seizure in execution of any judgment. The ranking of foreign attachments was in the order of attachment, but where a first attaching claimant was guilty of laches, a subsequent attaching claimant obtaining a first judgment on his attachment would gain priority.[395]

The attachment was called "foreign", implying a defendant who was not a resident but, at least in London, no such condition was required and the goods of a resident could be attached as could those of a non-resident. There was a requirement that the plaintiff file a fictitious return of the sheriff stating that the defendant could not be found but, in reality, no service was attempted. The key requirement was simply that the debt had to have arisen and the goods or moneys owed to the defendant had to be attached within the City of London.

The garnishee could file a negative declaration called a *nil habet*, where he denied possessing the defendant's property, and a decision in his favour dissolved the attachment. Where the plaintiff

[394] Brandon, at page 7. Mareva injunctions inherit their name from the ship involved in Lord Denning's decision in *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.* [1975] 2 Lloyd's Rep.509 (C.A.).

[395] Brandon, at page 15.

successfully obtained judgment, he had to file security in the form of a pledge to restore the property to the defendant, should the defendant move the court within a year and a day of the judgment and successfully disprove the debt.[396]

Thus the foreign attachment of the Lord Mayor's Court was similar to procedures in French arrest cities and to today's Mareva injunction or to a seizure before judgment by garnishment in modern Quebec civil practice. It was a proceeding *in personam*, not *in rem*, and the sale of the property attached gave no clear title, contrary to sale by a court of admiralty. The remedy was very popular throughout the period under review.[397]

The foreign attachment has been compared to the modern Rule B attachment of the federal courts of the United States,[398] and it is clear that the words of Browne referring to the abatement of admiralty attachments have had a lasting effect on admiralty process in that country. This does not however prove that today's Rule B attachment is related to the Lord Mayor's Court foreign attachment. But Browne's suggestion that the admiralty attachment had abated "in latter times" has been influential. In fact, assuming Clerke's description of the arrest of any property belonging to the defendant to be accurate, the practice had disappeared long before Browne's time. But was the power related to a foreign attachment?

In the United States, the federal courts have *in rem* jurisdiction, but can also attach goods found within the geographical jurisdiction of the court, as long as the defendant is not found in the jurisdiction. The Rules of Civil Procedure incorporate the former admiralty rules, including former rule 2. That rule, first adopted in 1844, referred to *in personam* suits, stating that "mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent ..., as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount

396 Brandon, at page 17.

397 There are no reliable judicial statistics prior to 1858. In that year the British government started compiling judicial statistics for civil courts, including the High Court of Admiralty and the Lord Mayor's Court. See *infra*, note 630. From 1858 until the merger of the superior courts on November 1, 1875, there were on average more than 800 foreign attachments in the City of London each year issued by the Lord Mayor's Court.

398 Federal Rules of Civil Procedure, Admiralty Supplementary Rule B.

sued for, if the respondent shall not be found within the district." Attachment was to compel the defendant to appear.[399]

Former admiralty rule 3 went on to state that "in all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made on similar or analogous process issuing from state court." In 1850, a second paragraph was added to rule 3, abolishing imprisonment for debt in admiralty in all cases where, by the laws of the state in which the court is held, imprisionment for debt is abolished. Presumably it remained available in all other states.

But unlike in London foreign attachment practice, in American admiralty practice, the residence of the defendant within the jurisdiction makes Rule B attachment impossible. Further, the Rule B attachment is of goods belonging to the defendant and does not require the garnishment of a third party. But the two are otherwise very similar and give rise to the question whether they are of common origin.[400] Former admiralty rule 36 referred specifically to cases of foreign attachment, but several states had adopted general foreign attachment statutes, and it cannot be concluded that an attachment in admiralty was a foreign attachment in the eyes of the rule makers.

It would appear clear however, that regardless of any similarities between foreign attachments in London and Rule B attachments in the United States federal courts, the latter originate from Clerke's description of the arrest of any of a defaulting defendant's assets, and from Browne's comment that an admiralty attachment process had recently gone into abeyance. But neither author confirms a link between foreign attachments and *in rem* process. Rather, *in rem* process appears to be a separate remedy, neither linked to Roman law, nor to the charters of arrest cities. However, the common law courts had some things in common with the admiralty, and the question of the effect of common law mesne process on *in rem* process remains to be explored.

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399 In the South Carolina case *Bouysson v. Miller*, Bee 186, 3 F.Cas. 1021 (1802 D. S.C.), the district court sitting in admiralty states that attachment in admiralty is based on Clerke, chapter 24. See also *Reed v. Hussey,* 1 Blatchf. & H. 525, 20 F.Cas. 440 (1836 S.D.N.Y.)

400 The power of attaching goods, including sister ships belonging to an absent defendant, has been said by the United States Supreme Court to be based on Clerke's description of admiralty arrests and Browne's lamenting of the abating thereof, but not to be based on foreign attachments in London. See *Manro v. Almeida*, 23 U.S. 473 (1825), at pages 490 and 491. See also William Tetley, *Maritime Liens and Claims*, *supra*, note 144, at pages 973 *et seq*., as well as his companion article, "Arrest, Attachment and Related Maritime Law Procedures" (1999) 73 *Tul. L. Rev*. 1895. Tetley argues at page 1957 that attachment would have been an independent admiralty remedy in England and could thus be "resuscitated" by an admiralty court.

INTERLOCUTORY REMEDIES:
MESNE PROCESS IN THE COMMON LAW COURTS

The courts of admiralty were not the only courts where arrest was possible in civil actions. The common law courts of England had long availed themselves of the arrest of defendants. However, arrest of a defendant in a civil case was clearly not a remedy of ancient common law, but rather an invention of statutory origin. Arrest of the person at common law was only available for injuries in the nature of a trespass committed with force.

The power of arrest in cases other than trespass was first given to the lords against their bailiffs to compel them to issue accounts in 1268.[401] The power was extended in 1283 to mercantile contracts and to actions of debt and detinue.[402] But it was only in 1504 that the remedy was made available in actions on the case, the newer and more flexible common law proceeding that would increase the range of available remedies throughout the Tudor period and beyond.[403]

Arrest of the defendant was available at the interlocutory stage and after final judgment. The remedy was thus available to arrest a defendant who did not appear, by the issuing of a writ of *capias ad respondendum*, literally directing the sheriff to take the body of the defendant in order that he might be made to respond to the claim. This writ was often referred to simply as a *capias* and the interlocutory proceeding it triggered was called *mesne process*.

The requirement that the defendant appear to respond to the claim stems from the medieval practice in England of oral pleading, whereby the parties, or more usually their counsel, debated in French in open court the points of law or issues to be put to the jury.[404] Without the appearance of the defendant, the plaintiff could not deliver his declaration. The tenor of these debates following appearance did not appear on the official court record, the Plea Rolls, but, at least before the royal courts in Westminster, debates from select cases were noted verbatim and

401 (1268), 52 Hen. III, c. 23.
402 (1283), 11 Edw. I, c. 17.
403 (1503), 19 Hen. VII, c. 9.
404 See U.K., H.C., "First report made to His Majesty by the Commissioners appointed to inquire into the practice and proceedings of the Superior Courts of Common Law", *Sessional Papers*, No. 46 (1829), at page 70.

privately circulated among the legal community in what were called the term books, now more commonly called the Year Books.[405]

Due to this requirement of oral debate, the concept of obtaining a judgment required the presence of the defendant or his representative. A defaulting defendant resulted in an action that could not proceed. It was only a short step from there to having the defendant physically brought to the court and mesne process paved the way to doing so. The defendant was, at least in theory, arrested and sent to gaol and could only be released upon providing bail. Following final judgment, only a portion of the defendant's assets, excluding much of his real property, would be subject to execution for debt, and so a writ of *capias satisfaciendum* was available as *final process* to have the defendant imprisoned until he paid the sum.

These writs evoke memories of novels of Charles Dickens such as *The Pickwick Papers*, *David Copperfield* and *Little Dorritt*. In fact, Dickens himself had been in debtors' prison as a child, when his father had been arrested. And when those books were written, the whole question of arrest, and especially of mesne process, was the subject of heated debate.

The debate centred on the effectiveness of mesne process. Although, in principle, arrest before judgment was only available where the defendant, having been served with the writ upon which the action was based, was in default of appearing, the reality was much more complex. The practice had become common of obtaining a writ of *capias ad respondendum* from the superior court where a personal action was to be heard, without having the originating writ issued.[406] The reasons for wanting to do so included the difficulty of determining, in certain cases, what

[405] The Year Books run almost continuously from the reign of Edward I to that of Henry VIII. The Selden Society is one historical society that has published modern editions of the Year Books with an English translation.

[406] Suits at common law commenced with the issuance of an original writ out of the Court of Chancery in the name of the king, directing the sheriff of the county where the event took place, to command the defendant to appear in the superior court stated in the writ. These original writs are to be distinguished from judicial writs of mesne process, which were issued in the name of the chief justice of the court where the action was to be heard. See Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (London: Butterworths, 1824) [hereinafter Stephen], at page 25. The obtaining of the arrest or attachment of the defendant without originating writ may be linked to the privilege of attachment of certain lawyers, including serjeants-at-law, their clerks and servants and some attorneys. See J.H. Baker, *The Order of Serjeants at Law* (London: Selden Society Supplementary Series, vol. 5, 1984), at pages 42 *et seq*.

originating writ was appropriate, and, in all cases, the time and expense of having such a writ prepared.[407]

Prior to the reform of common law procedure in the mid-nineteenth century, starting an action in England required reflection. There were three superior courts of common law, the King's Bench, the Common Pleas and the Exchequer. Traditionally, crimes and claims concerning the crown, other than revenue, were exclusively assigned to the Court of King's Bench. Matters concerning royal revenue went to the Court of Exchequer. All suits between subject and subject were assigned to the Court of Common Pleas.

However, over the years and through wrangling between the superior courts, the Common Pleas lost its exclusive jurisdiction over civil claims in personal actions and during the period under review, all three superior courts claimed jurisdiction over any personal action whatsoever. The Common Pleas only retained exclusive jurisdiction over real actions concerning the possession of, or title to land, and over mixed actions involving land claims, combined with a claim for damages sustained upon or in respect of such land.[408]

Needless to say that each superior court had its own way of doing business. Because each type of case required an original writ, the Chancery clerks were to find the right form. This in turn, led to the stiffness of the system, as a new claim required a new writ and the clerks were not empowered to invent new writs.[409] The claimant would thus try to find a similar writ and books or registers of writs were prepared and published to enable attorneys to keep track of what writs were available. For personal actions, the most flexible writ invented by the clerks was the writ of trespass upon the case (*transgressione super casum*). The term trespass was perhaps a misnomer, considering the wide variety of claims that this writ covered, and the remedy was most often referred to, at least in a context of tort actions, as an action on the case, without reference to trespass.

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407 The Common Law Commissioners, in their second report, state that the system was so technical and complex that the abolition of the old forms of action could only be a benefit. See U.K., H.C., "Second report made to His Majesty by the Commissioners appointed to inquire into the practice and proceedings of the Superior Courts of Common Law", *Sessional Papers*, No. 123 (1830), at page 6.

408 Stephen, *supra* note 406, at pages 3 *et seq*.

409 In the second *Statute of Westminster* (1285), 13 Ed. I, stat. 1, c. 24, the clerks were instructed to make writs work in similar cases (*in consimili casu*), but were not empowered to make new writs where no similar writ could be found.

But this new writ went much further than tort law. The action of *assumpsit*, a claim on a contract not under seal alleging an obligation accepted by the defendant, was commenced by this writ, as was the action of trover concerning the dispute of property to goods, fictitiously alleged to have been found by the defendant, and even a claim for libel.[410] The writ of trespass on the case even included certain real property rights. By suing in *ejectment*, the plaintiff could use the writ to allege that he had been ejected from the lands he held for a term of years, thus avoiding the intricacies of the Court of Common Pleas, and could seek not only damages, but a collateral order of reinstatement in those lands.[411] Inevitably, this simpler remedy was adapted through legal fiction to include freehold claims, as long as the plaintiff could claim a right of entry.

But writs were not required in every case, and in all three common law courts in England, proceedings could also be by bill, no writ being issued.[412] It would be beyond the scope of the present enquiry to explain the intricacies of the choices of proceeding by writ or by bill. Suffice it to say, that when proceeding by original writ, the plaintiff's attorney prepared a præcipe or draft writ which he took to the selected court to obtain an order to the Chancery to issue the original writ. The original writ involved paying a fee or fine and the desire to avoid the fine led to the practice of proceeding without obtaining originating process at all. The way to do this was to have the selected court issue interlocutory or mesne process before requesting the issuance of an original writ.

Thus mesne process was issued at the option of the plaintiff. A plaintiff could and in theory should issue an originating writ to which he could add a writ of *capias*, or he could simply obtain a *capias* without an original writ. With or without an original writ, if he chose to simply serve the *capias* on the defendant, the process was said to be *serviceable*. Where interlocutory arrest was sought, the process was said to be *bailable*. In practice, a serviceable action was simply served on the person of the defendant without his arrest, whereas the latter involved the sheriff or his deputies arresting the person of the defendant or obtaining bail.

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410 Stephen, *supra* note 406, at pages 17 *et seq*., gives examples of writs of assumpsit and libel as reflecting the most popular writs of trespass on the case.

411 *Ibid*., at page 22. See the Second Report of the Common Law Commissioners, *supra*, note 407, at page 6.

412 Stephen discusses the various bill formalities, but the most interesting description may be found in the First Report of the Common Law Commissioners *supra*, note 404, at pages 70 *et seq*. Their description of the complexity of pleading in the common law courts led to the adoption of the *Unity of Process Act*, 1832 (U.K.), 2 Will. IV, c. 39, which replaced the forms of action by a unified writ of summons. However, the legislation did not apply in the admiralty courts.

This choice of process existed in all three common law courts for personal actions, although real and mixed actions in the Court of Common Pleas were serviceable only. But even for real rights, personal actions had become so popular during the period under review, that the Court of King's Bench had, by contrivance to increase its portion of business, become the most prolific issuer of mesne process by the beginning of the nineteenth century.[413] The excuse for mesne process was to enforce the defendant's appearance, even though a simple summons from the court might have been equally effective. Further, by statute in certain cases, the plaintiff, throughout the period under review, was empowered to enter an appearance for a defaulting defendant, especially where the right of arrest was removed due to the debt being less than a set sum.[414]

Where mesne process was bailable, it was executed by the arrest of the defendant. To obtain a writ of *capias* the plaintiff made an affidavit confirming the debt to be in excess of the minimum statutory limit. The sheriff then was ordered to take the body of the defendant into custody and to maintain him in custody unless bail was provided to the sheriff to ensure the defendant's appearance, in the form of a bond of two persons as sureties in a sum double that sworn to by the plaintiff. This bail was to the sheriff and was termed *bail below*.

But bailable process was not confined to ensuring the appearance of the defendant, but was also for securing payment of the sum to be recovered by final judgment. Thus, although bail below would avoid imprisonment for a time, a second bond would be required by the plaintiff to answer the action, termed *bail above*. Bail below was to hold the sheriff harmless should the defendant not appear. Bail above was to answer the action proper once appearance was entered. The same sureties could and often did issue both, as the provision of bail above would be in replacement of bail below. Without these bonds, the defendant would be taken into custody, unless he chose to deposit in court the sum sworn to plus costs.[415]

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413 See the First Report of the Common Law Commissioners, *supra*, note 404, at page 77. See also U.K., H.C., "Report from the Committee on the King's Bench, Fleet and Marshalsea Prisons", *Sessional Papers*, No. 81 (1814-15). The King's Bench prison, by far the largest debtors' prison in England, was the repository for persons arrested for debt or contempt in that court. The Fleet prison was for those arrested for debt or contempt in the Courts of Chancery, Court of Exchequer and Court of Common Pleas. The Marshalsea prison was for those arrested for debt or contempt in the Court of Marshalsea or the Palace Court, and for those arrested in the High Court of Admiralty, including pirates.

414 See the *Act to Prevent Frivolous and Vexatious Arrests*, 1726 (U.K.), 12 Geo. I, c. 29 setting that sum at £10, and the *Act to Prevent Arrests on Mesne Process*, 1827 (U.K.), 7 & 8 Geo. IV, c. 71, increasing it to £20.

415 This option was rarely used due to the costs being set at £10.

Mesne process could be used to enforce real, mixed or personal rights, but it was clearly in the latter that it was most popular. Real and mixed actions, for which bailable process was not available, remained the ancient and exclusive jurisdiction of the Court of Common Pleas. But their popularity had diminished greatly, even for real property claims, due to the complexity and stiffness of the real action, and the enforcement of real and mixed rights had become possible by pleading the personal action of ejectment, which was more flexible. Real actions were eventually abolished in 1833.[416]

Ejectment however, involved its own complexities, and was commenced by the preparation of a letter addressed by a fictitious defendant, to the person in possession of the contested real estate, alleging that a fictitious plaintiff was seeking possession and advising him to appear to defend his possession. It was only when the person in possession appeared that the court substituted the real parties and subsequently heard the case to determine who had lawful possession.

Bailable mesne process thus became available in all three superior courts of common law. Even in the Court of Common Pleas, a personal action could be initiated by an original writ of common *capias*. The common *capias* was abolished in 1838,[417] but bailable mesne process continued to be available for debts in excess of £20 upon an order of the court, where probable cause could be shown that the defendant would abscond.[418] These legislative changes were the result of the reports of the common law commissioners.[419] But the possibility for a plaintiff to

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416 By section 36 of the *Limitations of Actions and Suits relating to Real Property Act*, 1833 (U.K.), 3 & 4 Will. IV, c. 27.

417 *Judgments Act*, *1838* (U.K.), 1 & 2 Vict., c. 110, s. 1.

418 *Ibid*., s. 3. The *capias ad respondendum* was only finally abolished by the first schedule to the *Crown Proceedings Act, 1947* (U.K.), 10 & 11 Geo. VI, c. 44, but imprisonment for debt would continue to be available in certain limited cases until the enactment of section 11 of the *Administration of Justice Act 1970* (U.K.), c. 31. Even then, it remained available for maintenance orders and income tax evasion. See *infra*, notes 420 and 432.

419 See the First Report of the Common Law Commissioners, *supra*, note 404, at pages 70 *et seq*. The Royal Commission produced, in all, six reports between 1829 and 1834. Another Royal Commission to report on the condition of the courts was struck in 1852 and produced three more reports between 1852 and 1860. Both commissions proposed several pieces of legislation. There were various other commissions in the mid-1800s looking into the English legal system as well, including commissions reviewing the chancery courts, the admiralty courts, the ecclesiastical courts and even the Inns of Court and of Chancery and legal education in general.

allege a fear that the defendant might abscond, kept bailable mesne process alive, at least until 1869, and thus throughout the period under review.[420]

Mesne process was inevitably subject to abuse. The plaintiff had the choice of proceeding with serviceable or bailable process, and one can only imagine the social hardship on the defendant when the bailiff came to arrest him for what might have been a debateable, if not bogus claim in debt. The bail required of the defendant was not available for the worse off, and could be tricky even for the businessman. But, as shall be seen, both plaintiff and defendant could abuse the system.

A plaintiff making a vague or even false claim of debt could cause hardship with a defendant by issuing a *capias ad respondendum* against him. The sheriff's bailiffs serving the action were often known to offer to arrange bail to the sheriff on behalf of any defendant who was unable to do so himself. At least this avoided the defendant's immediate arrest. However, in exchange for the bail offered by the bailiffs, exorbitant fees would be charged to the defendant.

The sureties providing bail to the sheriff were to ensure that the defendant would appear, failing which the sureties would be liable to the sheriff for the amount claimed. The sheriff would be liable to an action by the defendant if he refused bail below, regardless of its sufficiency.[421] But he would be liable to an action by the plaintiff if that bail was not available to respond and the defendant was not in custody. The plaintiff could demand an assignment of bail from the sheriff in order to pursue the sureties, but would most likely prefer to sue the sheriff if the sureties appeared to be insolvent.

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[420] See the *Debtors' Act*, 1869 (U.K.), 32 & 33 Vict., c. 62. The Act provided for the abolition of imprisonment for debt, with a few exceptions, and put an end to the loopholes left in the 1838 enactment. From the judicial statistics available for 1858 through to 1869, there were still on average more than 500 *capias* orders issued each year. However, although the 1869 statistics indicate that they had ceased completely, imprisonment for debt would continue for another century by virtue of the remaining loopholes, until finally abolished between 1947 and 1970. See *supra*, note 418 and *infra*, note 432. Although the present enquiry explores very few developments of French procedure beyond the arrival of the British in Quebec, the ablolition of *contrainte par corps* in France took place at the end of the period under review in 1867. See Loi du 22 juillet 1867. See also Nadine Levratto, "Abolition de la contrainte par corps et évolution du capitalisme au XIX^{e} siècle" (2007) 10-11 *Économie et Institutions* 221. Quebec stands out as being one of the last jurisdictions to abolish civil imprisonment, only beating the United Kingdom by five years in 1965. See *infra*, note 445.

[421] First Report of the Common Law Commissioners, *supra*, note 404, at page 105. The sheriff was bound to free the defendant upon tender of bail, failing which he would be liable to action by the defendant.

Thus the sheriff was caught between a rock and a hard place. His solution was to assign the profits of the office to an under-sheriff, who would assign in turn to the bailiffs executing the process, in exchange for counter-security from them.[422] But this put the bailiffs in a position to extort sums from the defendant, to avoid or delay his arrest, in exchange for accepting bail from his attorney or even the defendant's own verbal undertaking.[423]

Once the defendant did appear, the bail below or to the sheriff would expire, but the defendant would then be required to put in bail above, to the plaintiff, ensuring satisfaction of the sum to be adjudged, or the rendering of the defendant to prison upon final judgment. At any rate, the solvency of the sureties providing bail to the plaintiff could only be contested by the plaintiff, and only during the term of court. If the contestation could not be completed before the end of the term, it would be put over until the next term.

However, if the plaintiff wished to contest the sureties, the whole action would come to a stop and the defendant could substitute sureties at any time, whereupon the contestation could be repeated. The defendant might wish to start with questionable bail above, without embarrassing his friends with the exception process[424] and, if such a contestation took place, to then, rather than substitute bail, put forward his friends as added sureties, thereby avoiding their involvement in the exception proceedings, and in fact producing a new bail. As can be easily understood, this state of affairs gave rise to the creation of sham bail, whereby, for a fee, people of dubious means would agree to put themselves forward as bail, thereby obliging the plaintiff to except to the sufficiency of bail, entailing unnecessary expense and delay.[425]

The sureties on bail above were answerable to the plaintiff for the defendant's further appearance as required, and, perhaps more importantly, for the payment of the debt claimed if it was found to be owed.[426] They could therefore take up the defendant's defence if they wished, in order to

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422 *Ibid*., at page 106.

423 *Ibid*., at page 107.

424 Upon contestation, the sureties would have to attend before a judge in chambers to be questioned on their solvency. However, the First Report on the Common Law Commissioners, *supra*, note 404, at page 104, confirms the poor results obtained in contestation. Out of 82 oppositions made to bail in November 1828, only two were successful.

425 *Ibid*.

426 See Sir John Baker, *The Oxford History of the Laws of England, Vol. VI: 1483-1558* (Oxford: Oxford University Press, 2003), at page 331. Baker cites the plea roll case of *Rolfe v. Mantell* (1555), KB 27/1174, m.

avoid paying, due to the defendant's default. They could also produce the body of the defendant to prison following judgment, to avoid having to pay in execution.

But before the sureties could be forced to pay the judgment amount, the plaintiff had to obtain a writ of *capias ad satisfaciendum* and have it returned. This would be done without service and as a mere formality, because the plaintiff would have little intention of arresting the defendant at this stage, when he could obtain execution from the sureties.[427]

However, if the plaintiff elected to arrest the defendant, the judgment would be deemed to be satisfied, and the plaintiff would have no further action against the sureties or against the goods of the imprisoned defendant. But execution in turn would require the plaintiff to issue proceedings against the sureties who might wish to delay as much as possible to put off payment, but also to try to capture the defendant themselves, as producing his body to the *capias ad satisfaciendum* would free them from any payment. And would leave the defendant in debtors' prison for an indefinite period. Regardless of the length of imprisonment, any arrest of the debtor, on mesne or final process, led to debtors' prison.

Debtors' Prison

Much has been written about debtors' prisons, especially in England, and during the period under review, they were crowded with debtors. In theory, a debtor was confined to prison until the full debt was paid. However, by various statutes, a debtor imprisoned on mesne or final process could obtain his freedom. Generally, these statutes allowed the court condemning the debtor to release him in exchange for giving up his estate and later, by petitioning the specialized Court for Relief of Insolvent Debtors. To obtain relief in that court, the debtor had to convey and assign all of his real and personal property to his creditors, as little as it might be, with the exception of clothing and professional tools, and pledge all future property that he might obtain to be liable to the debt as well.[428]

61 wherein the amount of £302 was recovered from a surety for the judgment debt against a defaulting defendant.

427 First Report on the Common Law Commissioners, *supra*, note 404, at page 111.

428 The Court for Relief of Insolvent Debtors was created for an initial period of five years in 1813 by the *Insolvent Debtors Act, 1813* (U.K.), 53 Geo. III, c. 102, and was continued by other temporary legislation thereafter. The

These statutes were not attractive to all debtors. The fact that much of the debtor's real and incorporeal assets could not be seized and sold in execution meant that some debtors preferred the life debtors' prison afforded, to the releasing of their assets to their creditors. As strange as this may sound to modern ears, the commissioners enquiring into the process of the courts of common law found that the law enabled these debtors to avoid execution and to live a relatively easy life in prison.[429]

The commissioners recommended that the law of imprisonment for debt, both before judgment and in execution, be repealed except in cases of fraud.[430] But the commissioners did not recommend that the property of the defendant should be seized before judgment, as they felt this would create greater inconvenience than arrest of the person, even though mesne process led them to comment that large numbers were suffering imprisonment without a review of the claim and without security being provided by the plaintiff against bogus claims.[431]

The state of debtors' prisons was not reviewed by the commissioners, as it had been reviewed in 1815 by the Committee on the King's Bench, Fleet and Marshalsea Prisons.[432] The 1815 report is a frank exposure of the practices in these prisons. The practice of chumming, whereby the first

Court became permanent in 1826 with the passing of the *Insolvent Debtors' Relief Act, 1826* (U.K.), 7 Geo. IV, c. 57.

429 See U.K., H.C., "Fourth report made to His Majesty by the Commissioners appointed to inquire into the practice and proceedings of the Superior Courts of Common Law", *Sessional Papers*, No. 239 (1831-32), at pages 13 and 19 *et seq*.

430 *Ibid*., at pages 35-45.

431 *Ibid*., at page 16. Note that the report of the commissioners was not unanimous in its recommendation to abolish mesne process for arrest in most cases. The commissioner Henry J. Stephen, serjeant-at-law and doubtlessly the author of Stephen, *supra*, note 406, reflected the thoughts of a majority of witnesses interviewed by the commissioners in his rejection of the recommendation. See *ibid*., at pages 46-86.

432 See Report of the Committee on the King's Bench, Fleet and Marshalsea Prisons, *supra* note 413. A trilogy of reports on the King's Bench, Fleet and Marshalsea prisons had been tabled in Parliament in 1729. See U.K., H.C., "Report From the Committee Appointed to Enquire into the State of the Goals of this Kingdom" in *Sessional Papers*, vol. 12, 1729. Another report was tabled in the House of Commons in 1792 by a committee struck to enquire into the practice and effects of imprisonment for debt. See U.K. *Journals of the House of Commons*, vol. 47 (2 April 1792), at page 640. The 1729 reports reveal a depressing regime of torture, extortion and even murder at the hands of prison officials. The 1792 report is somewhat more tame in its description of conditions, but by 1815, if torture and murder had clearly receded, neglect of prisoners and continued rampant extortion had done little to relieve the suffering of the poor. For a modern description of eighteenth-century debtors' prisons in England see Joanna Innes, "The King's Bench Prison in later Eighteenth Century: Law, Authority and Order in a London Debtors' Prison" in John Brewer and John Styles, eds., *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (New Brunswick NJ: Rutgers University Press, 1983). Ms. Innes looks at the power the prisoners exercised as a group in an attempt to offset the authority of the jaiers. There would be several more parliamentary committee reports before imprisonment for debt would be finally abolished by the *Administration of Justice Act 1970* (U.K.) c. 31, s. 11. See Stephen J. Ware, "A 20th Century Debate about Imprisonment for Debt" (2014) 54 *Am. J. L. Hist*. 351.

prisoner or "owner" of a room was made to share the room with a "chum", and the fees paid to the gaolers by owners to avoid chumming are of interest to any reader.

At the time the Committee visited the King's Bench prison in March 1815, there were 192 rooms, but 440 prisoners within the walls. Of the 192 rooms, 80 were occupied singly, while several others had as many as six prisoners per room. Furthermore, although in theory women who were not prisoners and children were not allowed, there were an additional 180 women and children within the walls.[433] The Committee found that women could come and go, thus giving rise to prostitution within the prison.[434]

Debtors' prisons were divided by class, with a master's side and a common or poor side. Occupants of the former paid a higher rent than the latter and did not, like those on the poor side, have to take turn standing watch by the gate with the begging box. The walls did not and could not contain all prisoners, and so those who had some money could benefit by the "rules", a system endorsed by the courts, given the number of prisoners and the shortage of rooms. At the time of the Committee's visit to the King's Bench prison, there were an additional 220 prisoners in this category. They lived outside the walls, in any house within a perimeter of two and one half miles thereof, and were not supposed to be found in taverns, although this regulation was apparently not applied rigorously. An enterprising debtor could work or carry on business in the rules, if he could secure credit, without further worry of being imprisoned for debt.

A prisoner within the walls who could not afford to purchase a rules exception, could petition the court for a day-rule to be absent from 09:00 hours to 21:00 hours. However, the Committee found that, in practice, the prisoners purchased day-rule passes from the prison guards. Where the sum for which the prisoner was detained was large, the guard required security or, if the prisoner could not furnish sureties, a fee, enabling the guard to see that the prisoner was

[433] Report of the Committee on the King's Bench, Fleet and Marshalsea Prisons, *supra* note 413, at page 13. In 1781, the King's Bench had ordered that the prison was not to allow wives and children to accompany prisoners under any circumstances. But the order was ignored.

[434] Prostitution in debtors' prison was common, and the Fleet prison was described by its own deputy warden as "the largest brothel in the metropolis". *Ibid.*, at page 21.

accompanied by a man to ensure his return.[435] For smaller debtors, a smaller fee was extracted, and no accompanying person was required.

No salary was attached to the position of prison officials, including that of warden and deputy warden. However fees paid by prisoners made these positions extremely lucrative. The Committee found that the deputy warden of the King's Bench prison netted more than £1,800 per annum, exclusive of profits made on the sale of intoxicating liquor. The prison ran a coffee shop and sold beer, wine and hard liquor to the inmates who could afford to purchase it.[436] Drunkenness and gambling were common along with prostitution.

Fees were paid not only for temporary release from prison, but for virtually all aspects of life in debtors' prison. Fees for chumming or for not being imposed a chum were common.[437] Fees were required to see a doctor. Although the marshal of the King's Bench prison informed the Committee that the prison was "uncommonly healthy", the Committee found several examples of very ill inmates, including a "poor Dutchman" who was suffering from jaundice and who was not only in need of care, but obliged to share a room with five men, two women and two children.[438] The Fleet prison was no better, and the Committee reports a woman having suffered a miscarriage being found in bed with her husband, sharing a room with another couple and a single man.[439]

All these aspects of prison life contradicted the orders of the courts, but went on unabated at the time of the Committee's visitation.[440] However, notwithstanding the misery associated with debtors' prisons, those who had the means to pay fees lived free of their creditors in prison or even within the rules, came and went at their leisure and lived comfortable lives. The Committee even found that many debtors who lived within the walls did not leave prison when they were entitled to discharge.[441]

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435 *Ibid*., at page 7.

436 *Ibid*., at page 16. In the year prior to the visit of the Committee, the sale of 540 butts of porter and 65 barrels of ale alone netted the marshal £872 in income.

437 *Ibid*., at page 12. The chum-master made weekly rounds to collect rent.

438 *Ibid*., at page 10.

439 *Ibid*., at page 21.

440 These abuses were not new and in 1758 Parliament had enacted the *Relief of Debtors Act, 1758* (U.K.), 32 Geo. II, c. 28 to punish gaolers involved in extortion or extracting fees beyond those approved by court.

441 Report of the Committee on the King's Bench, Fleet and Marshalsea Prisons, *supra* note 413, at page 16.

The English process of personal arrest and imprisonment travelled with the common law to North America and the imprisonment of debtors and writs of *capias* were known in Canada and in Quebec.[442] With the arrival of the British, the arrest of persons for debt was introduced in Quebec, but had at any rate been known as *contrainte par corps* under the French regime.[443]

[442] Imprisonment for debt was introduced in British North America with the arrival of English law. The French regime had not known anything quite like *capias ad responendum*, although *contrainte par corps* was available in execution of judgment in certain cases. Imprisonment for debt existed in both Lower and Upper Canada. See Edmond Lareau, "De l'emprisonnement en matières civiles" (1874) 6 *R.L.* 84 and 277, and (1875) 7 *R.L.* 379. For a more modern viewpoint, see Evelyn Kolish, "Imprisonment for Debt in Lower Canada, 1791-1840" (1987) 32 *McGill L.J.* 602 and Peter Oliver, *'Terror to Evil-Doers': Prisons and Punishments in Nineteenth-Century Ontario* (Toronto: Osgoode Society Publications, 1998), at pages 48 to 60. See also Philip Girard, Jim Phillips and R. Blake Brown, *A History of Law in Canada* (Toronto: Osgoode Society Publications, 2018), vol. 1, at pages 329 and 378. Kolish argues that there were differences between the English law on imprisonment for debt and the law applicable in Quebec. She demonstrates that the population of debtors in Lower Canada prisons between 1791 and 1840 was much lower than that in England or in Upper Canada, due in part to the tradition of *contrainte par corps* being traditionally only a limited remedy in execution, and to the fact that Quebec allowed a broader power of seizure and sale, which included the debtor's real property along with personal property, thus reducing the need to consider personal arrest.

[443] On October 30, 1760, Murray established military courts. See Adam Shortt and Arthur G. Doughty, *Documents relating to the Constitutional History of Canada 1759-1791*, revised edition (Ottawa: Taché, 1918), at page 42. However, the establishment by Murray of civil courts in September 1764, included the creation of a Court of Common Pleas, designed to appease the French Canadians, who were unsure of the English law imposed upon them by the Royal Proclamation of 1763. *Ibid*., at page 205. The new court was to "determine agreeable to equity, having regard nevertheless to the laws of England, as far as the circumstances and present situation of things will admit". *Ibid*., at page 207. Hearings would require testimony in French and as Murray had yet to find "one English barrister or attorney who understands the French language", Canadian "advocates, proctors, etc." were granted rights of audience before the new court. Thus notaries from the former regime were allowed to argue before the new court. In fact the new court applied French law as previously applicable in Quebec, partly because the notaries could not understand English law, and partly because that law could not accommodate the day-to-day needs of the feudal seigneurial system the French had brought with them. *Ibid*., at page 207. The Court of Common Pleas was intended to hear disputes originating before 1763, but in fact the court continued applying the former law even to new disputes, subject to any statutory changes introduced by Murray. One of those changes was the procedure whereby process in the Court of Common Pleas was to commence by "an attachment against the body". *Ibid*., at page 207. Following the *Quebec Act* of 1774, the Court of Common Pleas would be continued by the provincial *Ordinance for establishing Courts of Civil Judicature in the Province of Quebec* (1777), 17 Geo. III, c.1, art. 2. Article 1 of the *Ordinance to regulate the proceedings in the courts of civil judicature in the province of Quebec* (1777), 17 Geo. III, c. 2 quickly re-introduced mesne process to Quebec, at least where the claim exceeded £10, in case it could be argued that the *Quebec Act* had somehow taken away the effect of the 1764 legislation, but only where the plaintiff alleged that the defendant was on the point of leaving the province. The power of attachment would be continued by the *Ordinance establishing Trial by Jury* (1785), 25 Geo. III, c. 2, arts. 4, 37 and 38, and again by the *Ordinance Re Proceedings of Civil Courts* (1787), 27 Geo. III, c. 4. See Shortt and Doughty, *ibid*., at page 858. The latter ordinance maintained the French law of *saisie-gagerie* for rents and of arrest as *dernier équipeur*, all the while retaining mesne process. However, perhaps strangely, the 1785 enactment allowed for a large application of arrest on mesne process, but limited arrest on final process to commercial matters, including the sale of goods by merchants to non-merchants. This mix of English and French procedure began the long and often tortuous Quebec tradition of mixed jurisdiction, but the mesne arrest possibilities were clearly of English origin. *Ibid*., at page 890. See the further enactment of *capias* process in sections 8 and 9 of the *Act to amend certain Forms of Proceeding in the Courts of Civil Judicature in this Province and to facilitate the Administration of Justice* (1801), 41 Geo. III, c. 7.

Quebec was then to become a mixed jurisdiction,[444] and would go on to be the last province in Canada to abolish *capias* or *contrainte par corps* in 1965.[445]

In other parts of the United Kingdom where common law was not applicable, similar processes appeared. In Scotland, for example, personal arrest developed in a civil law setting.[446] There, the term *arrestment* refers to the attachment of a debtor's movable property in the hands of a third party.[447] This is similar to the French *saisie en mains tierce* and to Quebec's seizure before judgment by garnishment.[448] But there are specificities in Scots law with regard to the arrest of

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444 Part of the mix was that the new arrest possibilities were superimposed on the continuing power to arrest by *contrainte par corps* under the Custom of Paris and the 1667 and 1673 French ordonnances. The vocabulary used by the Quebec legislator varied over the years. The imprisonment of debtors was referred to as "attachment against the body" in Murray's 1764 enactment, and in the 1777 ordonnance, translated into French as "une prise de corps", and in the 1785 amendment, the term *capias* was also used. By 1801, the legislation refers specifically to *capias ad respondendum* and *capias ad satisfaciendum*, but later the French translation of these terms was sometimes rendered indiscriminately as *contrainte par corps* even though the two were different and co-existing remedies. Quebec had known *contrainte par corps* as a remedy in execution of certain judgments under the French ordonnance of 1667 and 1673, but the remedy was only available in execution of judgment and thus could not be an accurate translation of *capias ad respondendum*. Quebec limited the availablility of *capias ad respondendum*, but later abolished *capias ad satisfaciendum* altogether, seen as a remedy available in execution of any money judgment, all the while keeping *contrainte par corps* alive in several instances similar to, but not identical to the French practice. For the limitation of mesne process and the abolition of *capias ad satisfaciendum*, see *An Act to Abolish Imprisonment for Debt, and for punishment of Fraudulent Debtors in Lower Canada, and for other reasons* (1849), 12 Vict., c. 42, ss. 1 and 2. For an illustration of the continuation of *contrainte par corps*, in tandem with *capias ad respondendum* process, see *An Act further to amend the Judicature Acts of Lower Canada* (1859), 22 Vict., c. 5, ss. 49 and 50.

445 In 1866, *contrainte par corps*, translated in the *Civil Code of Lower Canada* as "imprisonment under a judgment", and in the *Code of Civil Procedure of Lower Canada* as "coercive imprisonment", as well as *capias ad respondendum* would be codified as articles 2271 to 2277 of the *Civil Code* and as articles 781 to 796 and 797 to 833 respectively, of the *Code of Civil Procedure*. The continued use of both terms by then appears to be one of describing the substantive right, as opposed to the writ enforcing that right, and no longer one of differing remedies, even though the procedures were very different at the outset. *Contrainte par corps*, would only be finally abolished a century later, except for contempt of court. See the Act adopting a new *Code of Civil Procedure*, S.Q. 1965, c. 80, s. 1. For abolition in England and France, see *supra*, notes 418, 420 and 432.

446 Not unlike the law of Quebec, Scots law is derived from the civil law and the special influence of French civil law is reflected in both its process and vocabulary. The term *diligence* is used in Scots law in the sense of the English *capias* and of an attachment or seizure before judgment. It has been defined as the procedure by which a creditor attaches the property or person of his debtor in view of forcing him to either appear in court to answer the creditor's action, or to obtain security for a judgment pronounced or to be pronounced against the debtor. See John Graham Stewart, *A Treatise on the Law of Diligence* (Edinburgh: Green, 1898), at page 1. This definition has been criticized as too limited by the authors of *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Butterworths, 1992), vol. 8, under the title *Diligence and the Enforcement of Judgments*, at para. 101 [hereinafter *Diligence*]. The best modern description of arrestment is found in *Diligence* at paras. 247 *et seq*.

447 Arrestment can also attach the debtor's incorporeal rights such as debts owed to the debtor by a third party.

448 Arrestment has also been used to found jurisdiction on the sole basis of assets being found in the jurisdiction, but recent legislation has greatly impaired this usage. See *Diligence*, at para. 249. See also the *Civil Jurisdiction and Judgments Act 1982* (U.K.), c. 27, which prevents this procedure from being used against European defendants.

ships.[449] Arrestment can be *in personam* or *in rem*.[450] The *Administration of Justice Act, 1956* still applies in Scotland and sets out the cases where an arrestment can be practiced.[451]

Mesne common law process in England and in Quebec following the arrival of the British was available to creditors throughout the period under review. It enabled claimants to put often undue pressure on debtors in a wide array of causes of action due to its connection to actions on the case. The issuing of a *capias* remained available in England for debts in excess of £20 until the enactment of the *Judgments Act, 1838*. From then on, obtaining a *capias* required the fiat of a judge based on an affidavit establishing that the defendant was on the verge of absconding.

Although mesne process was less common from 1838, doubtful allegations of absconding debtors kept the process alive and easily available at least until the adoption of the *Debtors Act, 1869*. However, there remained, in theory and often in practice, the possibility of seeking an order of imprisonment, and the *capias ad respondendum* writ would only finally be abolished in England with the enactment of the *Crown Proceedings Act, 1947*. Even then, civil imprisonment for debt continued to be an option until the adoption of the *Administration of Justice Act 1970*, more than a century after the 1869 legislation. In Quebec, *contrainte par corps* remained on the statute books until the adoption of the revised *Code of Civil Procedure* in 1965, a century following the replacement of the former French enactments.

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449 Arrestment is usually *arrestment on the dependence*, which means before judgment, in which case an action for the sale or "furthcoming" of the attached goods in the hands of the third party or "arrestee" must follow, or *arrestment in execution*, which means following judgment previously obtained. However, these rules do not apply with regard to the arrestment of ships. Rather, there is no necessity of a third party for the arrestment of ships and a ship in the debtor's possession is subject to arrestment. The arrestment of a ship is sometimes referred to as *real* arrestment. See *Diligence*, at para. 322.

450 Admiralty arrestments are either *in personam*, which is identical to ordinary arrestment and, if the object in the hands of a third party is a ship, or the shares in a ship, the *in personam* arrestment can involve the attachment of a ship or shares, much as of any other movable property of the debtor in third-party hands, or *in rem*, in which case the ship itself, but not the individual shares are arrested. Arrestment *in rem* requires the exercise of a maritime hypothec, another concept borrowed from civil law, but virtually identical to a maritime lien under English maritime law. See *Diligence*, at para. 322. An arrestment *in rem* can be initiated even where the ship has been sold by the *in personam* debtor, as the ship itself is the true debtor under the hypothec.

451 *Administration of Justice Act, 1956* (U.K.), 4 & 5 Eliz. II, c. 46, s. 47. The existence of a statutory right of arrestment *in rem*, as opposed to a hypothec proper, is not as clear in Scots law as in English law. The admiralty arrestment is perfected by the sale of the ship, and the sale is free and clear of encumbrances as in English maritime law. The arrestment of cargoes is similar to the arrestment of ships, but may not be subject to restrictions under the *Administration of Justice Act, 1956*. See *Diligence*, at para. 328.

The similarities are numerous, but any demonstration of the extent to which interlocutory process in admiralty in England and in Quebec was affected by common law procedure and the reforms of that procedure in the nineteenth century, first requires a review of the age of reform.

THE AGE OF REFORM:
ADMIRALTY RULES IN THE NINETEENTH CENTURY

Having reviewed the development of interlocutory process and of admiralty process *in rem* through various lenses, there remains to be considered the reform of the British and colonial admiralty procedure in the nineteenth century. That century was one of reform throughout the common law world, but reform went well beyond the courts of common law and included the restructuring of the admiralty courts and, of special interest to this enquiry, of the ancient civil law processes of those courts.

The Vice-Admiralty Court System in North America

Maritime law came to North America with the arrival of the Europeans. French, English, Dutch and Spanish colonization led to the importing and reception of the laws of the mother countries. Along the Atlantic coast of North America, the first admiralty courts to be organized were the British vice-admiralty courts. There had been vice-admiralty courts in coastal ports in England since the 1500s.[452] The vice-admiralty courts in North America were active before the American Revolution and, for Canada, remained so until the enactment of the *Colonial Courts of Admiralty Act, 1890*,[453] following which the various remaining vice-admiralty courts were replaced by admiralty courts of the colonies.[454]

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[452] See G.S. Baker, *The Office of Vice-Admiral of the Coast* (London: privately printed, 1884) and R.G. Marsden, "The Vice-Admirals of the Coast" (1907) 22 *E.H.R.* 468, continued at (1908) 23 *E.H.R.* 736. Marsden argues persuasively that the office of vice-admiral, usually of a county, was created by Henry VIII in 1525. The office of lord high admiral and a high court sitting in London were introduced much earlier, probably at the beginning of the fifteenth century according to Marsden, to offset the irregularities that had arisen in the admiralty courts of the north, south and west. Those local admiralty courts were suppressed with the erection of the high court. See R.G. Marsden, "Early Prize Jurisdiction and Prize Law in England" (1909) 24 *E.H.R.* 675, at page 685. In parallel to the lord admiral, the Cinque Ports and other seaports, as well as some seaside manors, had and continued to exercise admiralty jurisdiction to the exclusion of the lord admiral prior to Henry VIII. Marsden argues in his prize article that the High Court of Admiralty was resuscitated by a treaty of October 4, 1518 between Henry VIII and Francis I of France calling for special tribunals to deal with the civil side of prize and piracy. See Thomas Rymer, *Fœdera conventiones, literæ, et cujuscunque generis acta publica, inter reges Angliæ*, 3rd ed. (The Hague: Neaulme, 1739-45), vol. VI, at page 177 and, in English, T.D. Hardy, *Rymer's Fœdera* (London: Longman, 1869-73), vol. III, at pages 756-757.

[453] *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27.

[454] Colonies including Canada which, even though a country since 1867, had no power to enact admiralty legislation due to the *Colonial Laws Validity Act*, *1865* (U.K.), 28 & 29 Vict., c. 63. Following the 1890 enactment, Canada assigned admiralty jurisdiction to its Exchequer Court which had been created in 1875. See the *Admiralty Act, 1891*, S.C. 1891, c. 29

The first vice-admiralty court formally created in North America was probably the Jamaican vice-admiralty court erected in 1662, but there had been similar courts sitting in Newfoundland from time to time to settle fishing disputes on the Grand Banks and, in 1615, what would appear to be the first-ever admiralty commission was issued by the High Court of Admiralty to Sir Richard Whitbourne for that very reason.[455] However, it was not until the end of the seventeenth century that the system was set up in a more organized manner.[456] Vice-admiralty courts in North America were mostly active from 1700 to 1776 for the colonies now forming part of the United States and from the 1720s to 1891 in Canada.[457]

The impetus for the expansion of vice-admiralty courts in the colonies was the enactment of a series of statutes referred to as the Navigation Acts. The first Navigation Act, enacted during the Interregnum in October of 1651[458], made no mention of colonial admiralty courts. However, the

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455 For a full discussion of Whitbourne's modest achievements and of vice-admiralty in the British North American colonies in general, see the excellent book by Helen Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London: Longmans, Green & Co., 1931) [hereinafter Crump], at page 27 and, at page 28, citing Whitbourne's *Discourse and Discovery of Newfoundland*, written in 1622. For Sir Richard's commission from the High Court of Admiralty see *Discourse and Discovery at Newfoundland*, at folios 63 *et seq*. In a general manner concerning vice-admiralty courts in North America, see the excellent introduction of Charles M. Andrews entitled "Vice-Admiralty Courts in the Colonies", in D.S. Towle, ed., *Records of the Vice-Admiralty Court of Rhode Island 1716-1752* (Washington: American Historical Association, 1936), as well as Andrews' chapter entitled "The Vice-Admiralty Courts" in his book *The Colonial Period of American History* (New Haven: Yale University Press, 1938). For a more recent view, see D.R. Owen and M. C. Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776* (Durham: Carolina Academic Press, 1995).

456 See Crump, *supra*, note 455, at page 127.

457 The first permanent vice-admiralty court established in Canada would likely be that of Halifax in 1749. Halifax was established that year as the new provincial capital of Nova Scotia. Port Royal or Annapolis Royal was the former capital. Pursuant to the Treaty of Utrecht in 1713, the French ceded much of Nova Scotia to the English, including Port Royal. However, over the ensuing three decades, there were continuous boundary skirmishes with the Acadians, and in 1749 the British decided to establish a new capital city on the Atlantic coast of Nova Scotia, and a new vice-admiralty court. See *infra*, note 469. But see A. Stone, "The Admiralty Court in Colonial Nova Scotia" (1995) 17 *Dalhousie L. J.* 363, at page 364, where the date of 1749 is contested. Stone believes the vice-admiralty court had existed in Annapolis Royal two decades prior, although no records earlier than 1749 have been found. Whatever the date, the new court's geographical jurisdiction included what is now Prince Edward Island and parts of New Brunswick. A decade later, the capitulation of Quebec City led to the establishment of the Quebec Vice-Admiralty Court in 1764. In both centres, there had clearly been earlier arrangements. In Halifax, admiralty cases had been heard by the governors since the commission to Richard Phillips in 1720 and, in Quebec, the French admiralty courts had existed since the beginning of the century.

458 C. H. Firth and R.S. Rait, *Acts and Ordinances of the Interregnum* (London: H.M.S.O., 1911) vol. II at page 559. Other Navigation Acts and multiple amendments were adopted in England from time to time under various titles referring to shipping and navigation (1660), 12 Car. II, c. 18; customs (1662), 13 & 14 Car. II, c. 11; the encouragement of trade (1663), 15 Car. II, c. 7; plantations (1670), 22 & 23 Car. II, c. 26; securing plantation trade (1672), 25 Car. II c. 7; American plantations (1696), 7 & 8 Will. III, c. 22; securing the sugar trade (1733), 6 Geo. II, c. 13; customs (1763), 4 Geo. III, c. 15; duties in American colonies (1765), 5 Geo. III, c. 12 and

Navigation Act of 1696[459] referred to recourse being made to courts of admiralty where offences under the Act were to be tried. The reference, in sections 2 and 7 of the Act, is to the "Courts of Admiralty held in His Majesty's plantations", although no such courts had been erected on the North American mainland at the time. Rather, several governors of the various colonies had received a general power over matters which included, expressly or impliedly, the powers of an admiralty judge.[460] However, the following year commissions were issued empowering the governors to set up vice-admiralty courts and to appoint judges and officers.[461]

By 1699, there were vice-admiralty courts in Virginia, North Carolina, Maryland, Massachusetts, Rhode Island,[462] New York,[463] Pennsylvania and South Carolina.[464] A vice-admiralty court was later erected in Georgia and these nine courts existed until the American Revolution.[465]

The courts of vice-admiralty in North America exercised powers more extensive than those of the High Court of Admiralty or the English vice-admiralty courts. The additional jurisdiction was statutory in nature, and principally concerned the Navigation Acts which were designed to control trading to and from the colonies and to ensure the crown was not defrauded of Customs revenues.[466]

Overall, the Navigation Acts obliged the colonies, including America up to the American Revolution, to only export and import specified goods by the use of British ships and crews and to route these goods through England instead of directly with another colony or any European country. They were unpopular and doubtlessly contributed to the grumblings of the American colonies. Furthermore, Customs duties were charged on the goods. Their enactment led to

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colonial trade (1768), 8 Geo III, c. 22. The Navigation Acts remained in force throughout most of the period under review, and were only abolished in 1849, partly to enable Canada at the time to access American markets.

459 *Plantation Act*, *1696* (U.K.), 7 & 8 Will. III, c. 22.

460 There are several books and articles written on the powers of the plantation governors. See above, note 455.

461 See Andrews' introduction to Towle's volume, *supra*, note 455, at pages 13-14.

462 New Hampshire and Rhode Island were included in the jurisdiction of the Massachusetts court but Rhode Island later had a court of its own.

463 The court in New York also covered East New Jersey and Connecticut. West New Jersey came under the court established for Pennsylvania.

464 See Andrews' introduction to Towle's volume, *supra*, note 455, at page 14.

465 See Owen and Tolley, *supra*, note 455 at page 35.

466 As noted above, the *Plantation Act, 1696* first mentioned the vice-admiralty courts in America. See *supra*, notes 458 and 459. Andrews' introduction to Towle's volume, *supra*, note 455 at page 17, underlines the importance of the 1696 Act and the fact that after its enactment, the vice-admiralty courts that were set up were courts of the king and not of the governor.

multiple cases of smuggling and attempts at avoiding duties and, in Quebec, the vice-admiralty courts were very active in pursuing offenders throughout the period under review.

This inevitably led to the question whether the decisions of vice-admiralty courts on additional heads of jurisdiction, including principally the Navigation Acts, were appealable to the High Court of Admiralty, as were other decisions, or to the king in council, considering that the High Court of Admiralty had no Navigation Act jurisdiction. The question came before the Privy Council in 1701.[467] The question was submitted to the Board of Trade which responded in 1702 that the new vice-admiralty courts were authorized by commissions under the great seal of the High Court of Admiralty and appeals thereafter went to that court.[468]

In Canada, prior to Confederation in 1867, there were vice-admiralty courts in Nova Scotia,[469] Quebec, called Lower Canada from 1791, Newfoundland, New Brunswick[470], Prince Edward

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467 W.L. Grant and James Monroe, *Acts of the Privy Council of England, Colonial Series* (Hereford: HMSO, 1910), vol. II at page 303.

468 See Andrews' introduction to Towle's volume, *supra*, note 455, at page 20. Andrews goes on the demonstrate that although the vast majority of appeals thereafter went to the High Court of Admiralty, the question was raised from time to time over the ensuing three decades.

469 See the report of H.C. Rothery, registrar of the High Court of Admiralty, dated January 18, 1861 in Can., H.C., "Return to an Address of the House of Commons, dated 19th February, 1877 for all Correspondence between the Government of the Dominion and of the late Province of Canada, and the Imperial Government, and all Orders in Council and other papers touching the Extension of the Jurisdiction of the Court of Vice-Admiralty to the Inland Waters of Canada", *Sessional Papers*, No. 54 (1877). Vice-admirals were commissioned in Nova Scotia from 1720 and a court of vice-admiralty from 1749. Prior to 1749, Annapolis Royal had been the capital of Nova Scotia since its capture from the French in 1710. The French had previously called the city Port Royal, but no French admiralty court appears to have been established, although a local admiralty court was later set up in Louisbourg. See the text accompanying notes 457 above and 652 below. The records of the Halifax Court of Vice-Admiralty are today divided between the federal LAC preservation centre in Gatineau Quebec and the provincial archives of Nova Scotia in Halifax. The Nova Scotia archives hold records and case files dating from 1749 to 1891, when the court was superseded by the Exchequer Court, pursuant to the *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict. c. 27. Few have dared venture into the Halifax court records although, as an introduction, see D.G.L. Fraser, "The Origin and Function of the Court of Vice-Admiralty in Halifax 1749-1759" (1961) 33 *Collections of the Nova Scotia Historical Society* 57. The Halifax court's registers, of which there are nine numbered RG1: 491 to 498 and 499½, cover 1749 to 1813 and contain references to more than 1,000 cases. Most of these are instance cases, but prize cases are common, especially from 1756 to 1762, during the Seven Years War with France. Instance case files in Halifax cover the years 1784 to 1792 and 1834 to 1891. LAC also holds instance case files of the Halifax Vice-Admiralty Court consisting of 12 volumes numbered 151 to 162, containing 131 file folders, including one instance case file from 1784, that of the *Hermoine Packet*, a wage claim, as well as 130 others dating from 1794 to 1818. There is a useful finding aid, numbered 612, prepared in 1993 by Patricia Kennedy of the State and Military Archives Program. A few of the file folders have escaped indexing in the finding aid. See, for example, the files of the *Bowyer*, *ex Brutus* in volume 154 and of the *Hunter* and the *Sally* in volume 159. Much more importantly, LAC holds virtually all prize case files from Halifax during the period from 1793 to 1815, which includes the War of 1812 with the United States. There are more than 800 prize case files from Halifax in the LAC collection. Halifax, perhaps due to its geographical location, was given exclusive prize jurisdiction by the *Prize Act*, 1801 (U.K.), 41 Geo.

Island[471], Victoria[472] and Vancouver,[473] but not in Upper Canada.[474] However, the establishment of formal vice-admiralty courts was not achieved in one attempt in most provinces. If the earliest

III, c. 96, but prize cases in British North America were rare after the War of 1812. Prize files in the possession of LAC have been arranged in a series of 153 volumes each containing, depending on the thickness of the enclosed documentation, between five and fifteen cases in file folders. The volumes are numbered 1-166 but there are no volumes numbered 115, 127, 128 or 141 to 150. The volumes are numbered chronologically with file folders arranged alphabetically within each volume. See *infra*, notes 802 and 803

470 A judge was appointed in 1784. See Rothery's letter *supra*, note 469.

471 Originally called Île St-Jean by the French, the British and French disputed the island. In 1719 a commission for a vice-admiralty court was issued but none created. After the end of the Seven Years War a vice-admiral was appointed in 1769. See Rothery's letter, *supra*, note 469.

472 A commission for a court issued in 1849. At the time the island was a separate colony. See Rothery's letter, *supra*, note 469.

473 This colony, called Columbia or British Columbia, received a commission for a court in 1858. See Rothery's letter, *supra*, note 469.

474 Rothery's report dated January 18, 1861, *supra* note 469, followed upon a request made in 1860 by the then judge of the Quebec Vice-Admiralty Court concerning jurisdiction in Upper Canada. Justice Black's letter concerned the jurisdiction of his court over disputes arising on the "inland waters", i.e. what was to become the Canadian side of the Great Lakes. These waters had been part of the old province of Quebec and, until the separation of Upper and Lower Canada in 1791, had been part of the territory coming under the jurisdiction of the Quebec Vice-Admiralty Court in Quebec City. Although disputes of a maritime nature originating from the Great Lakes were rare, cross-lake navigation was increasing, and the American federal courts had been given jurisdiction over inland water disputes by an 1845 Act of Congress, 5 Stat. 726. Consequently, Justice Black wanted to know whether the jurisdiction of his court should not be re-established over the inland waters of Upper Canada. Mr. Rothery, the registrar of the High Court of Admiralty, was requested by the Lord Commissioners of the Admiralty to issue a report on the subject. The exchanges and the report are reproduced in the return in the Canadian *Sessional Papers* for 1877. In his report, Rothery reviews the vice-admiralty courts in British North America and points out that the patents appointing the vice-admiralty judges in Quebec City prior to the 1791 referred to the Province of Quebec, whereas those issued after 1791 referred solely to Lower Canada. No other vice-admiralty court had jurisdiction over the Great Lakes. In order to enlarge the patent of Justice Black, Rothery proposes an Act of the British parliament. He is thereafter requested to draft a bill, but in a subsequent despatch dated March 18, 1861, Rothery rather suggests that the Governor General of Canada be first approached to enquire whether the jurisdiction given in England to the High Court of Admiralty to hear disputes over inland water disputes should be extended to Lower Canada. Apparently, this was done but no action was taken. However, in a bill first introduced in Canada in 1869 to create the Supreme Court of Canada, clause 58 was drafted to give the new court "exclusive jurisdiction in admiralty in cases of contract and tort, and in proceedings *in rem,* and *in personam*, arising on or in respect of the navigation of, and commerce upon, the inland navigable waters of the Dominion, above tide water, and beyond the jurisdiction of any existing Court of Vice-Admiralty". This complementary admiralty provision did not however appear in subsequent versions of the legislation or in the Act passed to create the Supreme Court and Exchequer Court in 1875. See Jan Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: Osgoode Society Publications, 1997), at page 73. As can be seen from Sessional Paper No. 54 for 1877, the matter arose again on December 22, 1873, when the Canadian Minister of Marine and Fisheries underscores the large increase of Lake Ontario traffic and suggests to the Governor in Council that a request be made to the British government to extend the jurisdiction of the Quebec Vice-Admiralty Court. The Canadian Privy Council makes the recommendation on May 18, 1874. The High Court of Admiralty registrar, now Mr. Bathurst, reports on June 30, 1874 that the American experience, outlined in the 1851 Supreme Court collision decision *The Genesee Chief*, 53 U.S. 443, equally applies to Canada, but that the jurisdiction of vice-admiralty courts over non-tidal waters requires further thought, and the advice of the Canadian authorities as to their wishes. The exchange ends with a report of the Canadian Privy Council to its British counterpart, raising the question whether the Parliament of Canada could not enact its own legislation. An upcoming visit of members of the Canadian government to England is proposed as an occasion to discuss the matter and on April 1, 1876 the British Privy Council agrees to the discussions. The correspondence reveals no further conciliar developments, but clearly, whether or not

vice-admiralty presence can be traced back to Sir Richard Whitbourne[475] the presence was, to say the least, sporadic, and in 1710 the expression of the need for a formal court for Newfoundland[476] illustrates the absence of any permanent seat of admiralty in the colony at that time. It was only in 1736 that a commissary for that province was appointed[477] and a vice-admiral was only first appointed for Newfoundland in 1810.[478]

A court of vice-admiralty was not created in Quebec during the military regime commenced in 1759. It was not until 1763 that a vice-admiralty court was seriously contemplated for Quebec. In December of that year, the former judge of the Court of Admiralty of Ireland, Dr. Hugh Baillie, was appointed to become the judge of the proposed vice-admiralty court for Quebec.[479] Baillie did not accept the position, perhaps in hopes of a more influential appointment, as the following spring he was appointed to be judge of the New York Vice-Admiralty Court, a position that Baillie never in fact occupied. [480]

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discussions took place at Downing Street, the Canadian government decided to move on its own. On February 26, 1877, the Canadian government tabled in the Canadian House of Commons Bill 41, entitled *An Act to establish a Court of Maritime Jurisdiction in the Province of Ontario*. See *House of Commons Debates*, 3-4, 26 February 1877, at page 271. The ensuing debates canvassed the jurisdiction of the Parliament of Canada to enact legislation covering admiralty jurisdiction in non-tidal waters. See *ibid*., at pages 272, 1056 and 1059 where the government and the opposition parties agreed that they could not pass a law to be administered by the Quebec Vice-Admiralty Court. The members mention the letter of Justice Black and the ensuing exchanges, but make no mention of the outcome of any discussions with the Privy Council. *Ibid*., at page 1441. Rather, the decision was made to legislate for the Great Lakes even if it meant that non-tidal waters between the Ontario border and Three Rivers, the furthest inland tidal waters, would consequently be under the jurisdiction of neither admiralty court. *Ibid*., at page 1442. The *Maritime Jurisdiction Act, 1877* was enacted on April 28, 1877. See S.C. 1877, c. 21. The Act extends vice-admiralty jurisidiction and remedies to the new Ontario court along with the practice in force as of the abolition of the High Court of Admiralty, a recent event at the time. The life of the new court would not be lengthy, as the enactment of the Imperial *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27, would lead to the transfer of admiralty jurisdiction to the Exchequer Court and the *Admiralty Act, 1891*, S.C. 1891, c. 29, s. 23 repealed the 1877 legislation.

475 See the text accompanying note 455 above, and especially Crump at the reference referred to therein.

476 See Stone, *supra*, note 457, at page 366, citing Cecil Headlam, ed., *Calendar of State Papers: Colonial Series America and West Indies (1710-11)* (London: H.M.S.O. 1924), at page 324.

477 *Ibid*. at page 366.

478 See Rothery's letter, *supra*, note 469.

479 Kevin Costello of University College, Dublin has written extensively on the subject of the Irish court and Dr. Baillie. See "The Court of Admiralty of Ireland, 1745-1756" (2008-2010) 50 *Am. J. L. Hist.* 23 at page 47. See also Costello's later book *The Court of Admiralty of Ireland, 1575-1893* (Dublin: Four Courts Press, 2011), at page 150.

480 The appointment of Dr. Baillie to the proposed Quebec court, dated December 19, 1763, can be found in the British National Archives at ADM 2/1057, folio 159. In the margin it is noted that the appointment was cancelled upon Baillie accepting an appointment to the New York Vice-Admiralty Court. However, as Costello points out, it was then discovered that the rumour of the demise of the incumbent New York judge, Richard Morris, was premature, and Baillie ended up losing both posts. See Morris's re-appointment on April 28, 1764 at ADM 2/1057, folio 171.

It was not until August 24, 1764 that James Murray appointed James Potts to be the judge, commissary and deputy of a court of vice-admiralty for the province and colony of Quebec.[481] The new court was to continue as part of the British vice-admiralty court system until the enactment of the *Colonial Courts of Admiralty Act, 1890*,[482] which transferred to the colonies the administration of admiralty court matters.

Under the vice-admiralty court system, judges, registrars and marshals were appointed by the High Court of Admiralty to hear cases in various ports in England and, of more importance to the present enquiry, in the British plantations and colonies. Vice-admiralty courts had been created on a sporadic basis in North America since the first court was set up in Newfoundland in 1615 and later in Jamaica in the 1660s.[483] But that sporadic basis led to a variety of admiralty procedures.

Many vice-admiralty courts were inactive, and had little current knowledge of admiralty procedure. This was not the case in Quebec or in Halifax,[484] where instance and prize courts were

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481 Murray refers to the commission of George III dated March 19, 1764 investing Murray with the vice-admiralty and the power to appoint surrogates. Apparently when Baillie was appointed a few months earlier, Murray was not involved.

482 *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict. c. 27.

483 Crump, *supra*, note 455, outlines in detail the sporadic attempts at creating admiralty courts in America. For Jamaica, see chapter VI and especially at page 98, for the creation of the Jamaican court. For the other Caribbean courts see Crump at chapter VII.

484 Case files in the Nova Scotia archives include suits from the 1780s through to and beyond the period under review in 1867 but with gaps, including a large gap between the 1790s and the beginning of the 1830s. Many cases from these years are in the possession of LAC. There are also several cases, perhaps more than 200 from 1813, referred to in the register for that year, RG1, volume 498. There are more than 60 boxes of files in Halifax which continue the series beyond the vice-admiralty era and include cases from the Nova Scotia admiralty district of the Exchequer Court, Canada's colonial court of admiralty and later admiralty court. See *supra*, note 469. The first seven boxes covering the 1780s and 1790s contain cases arranged in alphabetical order by ship name, the first box containing the letters A to C, and the seventh box letters T to W. The remaining boxes each cover one or more years with ship and party names in alphabetical order within each box. Box 8 contains miscellaneous correspondence from 1761 to 1835, but box 9 continues where box 7 left off with files from the 1830s onward. Box 23 brings the series to 1867 and the end of the period under review. The series of case file years is fairly complete from the 1830s, although there are small gaps, and it is not possible to verify how complete the series may be for each year as there are no registers to cross check, except for suits from the 1780s and 1790s contained in the first seven boxes. There are two original minute books of Justice Fairbanks in boxes RG40 9A and 14A, the former, labeled volume 1, covering the second half of 1836 and the latter, labeled volume 3, covering 1839 and 1840. The middle volume has gone missing. It would be possible to cross check the work of the court for these years to see if files not found in the boxes are mentioned in the minute books. The corresponding boxes, containing 93 case files, appear at first blush to hold less than a quarter of the references to more than 400 cases in registers RG1 volumes 497 and 499½ for the corresponding period. Register 497 refers to about 240 cases and register 499½ to more than 250 but many of these cases may be to earlier or later proceedings concerning the same vessels. The file numbers assigned to the case files in the LAC collection can be traced back to the period when these files were still in Halifax. A marginal note in Halifax

very active. However, with the loss of the American admiralty courts following the American Revolution, Britain had few other active vice-admiralty courts and decided to reform vice-admiralty procedure in the remaining colonies. Inevitably, this reform would underline the need for reform of the procedure of the High Court of Admiralty in London, a court that had been heretofore without general written rules of procedure.[485]

Reform of Vice-Admiralty Court Process

On June 23, 1832, the British Parliament passed *An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts Abroad, and to obviate Doubts as to their Jurisdiction*.[486] The legislation provided that Her Majesty in Council might make and amend from time to time rules and regulations concerning the practice in vice-admiralty courts, as well as a table of fees to be

register RG1 378 makes reference to a document in the Nova Scotia archives containing lists of vice-admiralty suits. This document, dated March 1, 1881, contains a series of manuscript lists prepared under the direction of the Nova Scotia Commissioner of Records of the day. The first 81 pages contain references to 39 boxes of case files in both the instance and prize courts. The files listed in 1881 have since been divided between Halifax and Ottawa. The document additionally contains references to one box of files from the provincial Court of Errors, to two boxes of files from the Court of Escheat and Forfeiture and to two more boxes of intestate estate papers. A review of the lists of vice-admiralty files contained in the document reveals that the list is of instance and prize case files only, and not of registers or other court records. Instance case file references run from 1784 to 1867, a period closely connected with the period under review in this enquiry. Prize case file references are separately listed and start in 1793, ending in 1815. As for file numbers for instance cases, file numbers are not written in any obvious fashion on the earliest case proceedings, but the Halifax lists appear to include instance case file numbers for cases initiated prior to 1784 and possibly from the inception of the court, although that may be unlikely as the file number on the earliest extant instance case file in 1784 is only number 65. Thereafter, instance file numbers on the lists appear to increase numerically with several gaps to number 229, filed in November 1792. These files are still in the Halifax archives. There follows two cases filed in June 1794 bearing numbers 241 and 242 which are today in the LAC collection. Instance case files between numbers 229 and 241 do not appear on the lists, but would have to have been filed between November 1792 and June 1794. Similarly, the six instance case files for 1795 listed in the Halifax lists, at least four of which are in the LAC collection, appear to be assigned file numbers ranging from 34 to 75. Instance file numbers continue to rise again through December 1802 with file number 316. However, these numbers are not in fact file numbers but rather refer to pages in two registers called *Liber 3* and *Liber 4* which explains the gaps. A note in the file number column on page 7 of the Halifax lists confirms that references are to pages in *Liber 3*. See *infra*, note 740. From 1803, actual instance file numbers are assigned, starting at number 1 and rising to number 98 in June 1814. The numbers then appear to start over at number 1 in 1815, rising to number 45 in 1817. Thereafter the Halifax lists only refer to sporadic case numbers but these include case numbers 65 in 1819, 69 in 1821 and 101 in 1832, which indicate that this sequence was continuous from 1815. In 1834 the Halifax lists indicate that instance file numbers start over once more at number 1 and rise again to number 200 in 1857. By the end of the period under review in 1867, instance files numbers reach number 230 but a gap between instance file numbers 200 in 1857 and 202 in 1860 is a bit surprising.

485 Although there had been rules established from time to time. See reference to the 1678 rules in the text accompanying note 540 below.

486 *An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad, and to obviate Doubts as to their Jurisdiction*, 1832 (U.K.), 2 Will. IV, c. 51 [hereinafter the 1832 Act]. The Act was tabled in the House of Commons as Bill 179 on May 22, 1832 and adopted on June 23, 1832.

collected.[487] Further, for the avoidance of doubt, section 6 of the 1832 Act confirmed the jurisdiction of vice-admiralty courts were over suits for wages, pilotage, bottomry, collision damages, breach at sea of navy regulations, salvage and droits of admiralty, whenever a ship or master is within the local limits of the vice-admiralty court, regardless of whether or not such causes of action arose within those limits.

Four days later, on June 27, 1832, a memorial was presented to Her Majesty in Council by the Lords Commissioners of the Admiralty proposing that a report of referees appointed by the Lords Commissioners be adopted. The report included draft rules and regulations for the purpose of ensuring a uniform system of practice in all vice-admiralty courts and a table of fees to be approved, and Her Majesty was pleased to approve its content by Order in Council.

The regulations to be observed in all courts of vice-admiralty consisted of 41 rules. Court was to sit regularly and the practice in some courts, where admiralty proceedings were less common, of requiring a petition to be presented to the judge to appoint a day for holding court was abolished.[488] As was the case in the High Court of Admiralty, advocates were to be sworn as surrogates, enabling them to hear and determine matters of practice in cases wherein they had no interest.[489]

The rules provide for the offices of registrar and of marshal. The registrar was to be sworn and to hold regular registry office hours. He was to enter all acts and decrees in an Assignation Book[490] which was to be the formal record of the proceedings of the court, and to prepare all documents necessary for the practice of the court.[491] The marshal was to execute all proceedings, including

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487 As in many courts of the day, judges and officers were not paid salaries, but rather collected fees in each case before the court.

488 *Rules and Regulations to be observed in the several Courts of Vice-Admiralty*, O.C. June 27, 1832 [hereinafter 1832 Rules], rule 1.

489 *Ibid*., rule 2.

490 *Ibid*., rules 3-5. Note that, in 1832, no Act Books or Warrant Books appear to have been maintained in the High Court of Admiralty since 1750 and 1774 respectively, and the Assignation Books were the only remaining record of proceedings. There never were Assignation Books maintained in Quebec by that name, although the vice-admiralty courts produced chronological registers, but, with the adoption of the 1832 Rules, Action Books were commenced. See *infra*, note 493.

491 1832 Rules, rule 5. The registrar was to prepare and swear all bail bonds, a job usually done by notaries public in England, and was to issue all warrants and collect all fees and other sums paid into court, to be remitted when required to England. The registrar was not to act as a proctor or advocate in any proceeding in which he also acted as registrar. The shortage of lawyers in the colonies meant that some vice-admiralty court registrars acted

the arrest of persons and things, and to make returns thereof to the court. Both the registrar and the marshal were empowered to appoint surrogates, the registrar first obtaining the consent of the judge, but the marshal could employ others to act on his behalf where expense could be avoided.[492] In such cases, the marshal was to prefer the collector or comptroller of Customs in the port where process was to be executed.

With regard to procedure, the 1832 Rules were designed to harmonize vice-admiralty practice throughout the empire. Proceedings were to be commenced with the entry of the action by the claimant's proctor in an Action Book requesting the issuance of a warrant and giving an estimated sum to cover the action and costs.[493] Entries commenced with words such as "arrest the ship or vessel" or "arrest the master of the ship or vessel" or "arrest the owner of the ship or vessel".[494]

Action Books had existed in English admiralty practice since the 1500s under the name of Warrant Books. No action on the instance side of the High Court of Admiralty could be commenced without an arrest, and the Warrant Books are thus the full record of instance admiralty suits from the inception of that court in London. The records of the High Court of Admiralty are voluminous, but all civil suits can be traced to their first entry in the Warrant Books.

Entries were made by the claimant's proctor, requesting arrest, usually of a ship, cargo or freight. Prior to the beginning of the nineteenth century, no affidavit was required, and the word of the proctor in the Warrant Book, along with the payment of a required fee, was sufficient to obtain a warrant of arrest. The entry was supposed to identify the claimant, the object of the arrest and the

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as practitioners, but the volume of actions in Quebec was sufficient to keep the registrar occupied on a full-time basis.

492 *Ibid*., rule 6.

493 *Ibid*., rule 7. The first Quebec Action Book is missing, but from corresponding Action Book entry numbers entered on the backsheet of proceedings, the first traceable Action Book entry was the case of *The Waterloo*, QVA 739-32 (1832 QCVA), which was the 17th entry in the missing Action Book. The suit, involving a passenger assault claim, was commenced on August 8, 1832. The claimant, William Rome, alleges having been beaten by the master, George Smith, on the passage from Hull in England to Quebec, for having commented on the master's conduct during a fight between two other passengers. The master was arrested by the admiralty marshal and released upon bail being provided.

494 The 1832 Rules were accompanied by an appendix prepared by the referees appointed by the Lords Commissioners containing forms of action. Forms 1 to 14 provide examples of the entries to be made by the proctors.

amount of the claim, but the first and last of these requisites were often but guesses. What was truly important was identifying the object of the arrest; the rest could be corrected in subsequent entries.

The English Warrant Books would eventually be called Action Books, although there is extant but one of these, containing suits entered between October 1858 to December 1859. This was the last Action Book in England. As of 1860, Cause Books became the instrument wherein suits were to be entered. There is today a large gap between the last Warrant Book, volume 78, containing entries from May 1772 to October 1774, and the Action Book. Whether there had been Action Books or Warrant Books between 1775 and 1858 is a matter of conjecture, but there are none in the National Archives, and it would appear unlikely that there ever had been.

The 1832 Rules set out that Action Books were to be maintained in vice-admiralty courts and used in the manner that Warrant Books had been traditionally used in England, to enable warrants of arrest to issue and suits to commence. The Quebec Vice-Admiralty Court kept Action Books from the coming into force of the new rules. Suits were commenced by the entry of the basic information identifying the claimant, the object of the arrest, the amount of the suit and the nature of the case. By the nineteenth century the entries were more accurate than they had been in earlier centuries in England, but the amount of the claim was still very much a formality, often referring to the amount of £5 in wage claims, regardless of the circumstances.

The first Action Book for the Quebec court has not survived, but entries in the Action Books that still exist are numbered in the margin, starting with number 1 for each year. These numbers were added by the registrar, as they are not in the same ink and writing as the proctor's entry of the suit, and were then copied on the backsheet of at least one of the principle pleadings filed in the corresponding suit. From these numbers on the individual pleadings, it can be seen that the first Action Book commenced in Quebec in July of 1832, just days after the promulgation of the 1832 Rules. The claimant's proctor was to exhibit to, and leave with the registrar, at the time of making the entry, an affidavit of the claimant, setting forth the nature of the claim and stating

that application for payment had been made to the defendant without success and that the court's aid was required to enforce the claim.[495] The warrant of arrest was issued based on the affidavit.

The 1832 Rules specify that the warrant of arrest was to be issued to the property or person proceeded against, but that the arrest of a person was never to be resorted to when justice could be otherwise obtained.[496] However, as can be seen from the forms appended to the 1832 Rules, and from the Quebec Action Books, this proviso went unheeded, and masters, mariners and owners were regularly arrested in suits, often along with the ship.[497] Arrest was thus effected by the claimant's proctor obtaining an affidavit to lead warrant from the claimant, attending the admiralty registry to make an entry in the Action Book, and serving the warrant issued by the registrar upon the object of the arrest. The warrant was served by the admiralty marshal.

According to rule 8 of the 1832 Rules, service of the warrant on a ship or cargo was effected by affixing the original warrant for a short time to the mainmast or some other conspicuous part of the vessel or cargo, thereafter leaving a copy of it on board or with the person having custody of the goods.[498] Where persons were to be arrested, the warrant was to be shown to the person to be taken into custody. Freight was arrested by arresting the cargo upon which freight was due. Once served, the marshal would endorse the method of service in the form of a certificate of service on the original warrant or appended thereto. The original warrant was then delivered to the claimant's proctor to be returned to the court registry for presentation to the court, with a minute to be made in the Assignation Book.[499]

This method of obtaining an arrest *in rem* has changed very little since. Canada's Federal Court still issues warrants of arrest upon the demand of the plaintiff's counsel and service *in rem* has not changed over the years.[500] In theory, service would involve nailing the warrant to the ship's mainmast to this day, but steel masts have given rise to the modern practice of taping the warrant

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[495] *Ibid*., rule 7. The requirement of an affidavit had been in force in England since 1801. See the text accompanying note 355 above. Affidavits had been required in Quebec prior to the 1832 Rules, but had probably not been used consistently in other vice-admiralty courts.

[496] *Ibid*., rule 7.

[497] *Ibid*., forms of action 21 to 34 illustrate the variety of warrants that could be sought and of the group, forms 22, 23, 24, 28 and 29 specify that the master or owner is to be arrested.

[498] *Ibid*., rule 8.

[499] *Ibid*.

[500] See *Federal Courts Rules*, SOR/98-106, rule 479, and the text accompanying note 186 above.

to a conspicuous part of the vessel, such as the wheelhouse door. In the Quebec Vice-Admiralty Court, a supplementary practice required the marshal to exhibit the silver oar, the mace of the court, as part of the arrest process, and arrests were contested in absence of the oar.[501] However, the requirement does not appear to be more than a local practice.

The 1832 Rules included special provisions for situations where property was appropriated or seized prior to the institution of a suit in admiralty. This included derelict suits,[502] where derelict property was already in a finder's possession, piracy suits,[503] where ships and property in the possession of pirates was seized and brought into a port, slave-trade cases,[504] where slave ships were found in British waters, and Navigation Act suits where Customs officials seized smuggled goods. In each case the court would require an affidavit of the circumstances of finding or capture of the subject property. The Quebec Vice-Admiralty Court was empowered to hear and determine such cases, and had been active in Navigation Act cases long before 1832. But the court was not geographically situated in a position likely to give rise to passing pirate ships or slave ships and there are no cases involving pirates or slaves in the court record during the period under review.[505]

Summary petitions, which had been the general process used in Quebec, not only in wage claims, but in all sorts of claims prior to the 1832 Rules, were now to be limited to claims for wages of mariners and of pilots.[506] These pleadings were doubtlessly intended to continue much as before 1832, and the new rules retained *viva voce* evidence, but did not require the preparation of formal libels, although nothing prevented a party from filing a libel instead of a summary petition.[507] All claims where the new rules did not require another form of pleading were to proceed by libel and by *viva voce* evidence.

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501 See *The Royal William*, QVA 1062-36 (1836 QCVA), where the master was cited in contempt for having refused to allow the marshal to arrest the mate in absence of the silver oar. See also *The Ariadne*, QVA 1093-36 (1836 QCVA), *The Sarah*, QVA 1133-36 (1836 QCVA) and *The Canton*, QVA UU[23]-43 (1843 QCVA), in all of which the master of the subject vessel resisted arrest notwithstanding the presence of the silver oar. The present whereabouts of the silver oar from the Quebec Vice-Admiralty Court is unknown, and may be at the bottom of the River St. Lawrence following one of these struggles.

502 1832 Rules, rule 22.

503 *Ibid*., rules 23 and 24. These rules gave effect to the *Piratical Ships Act*, 1825 (U.K.), 6 Geo. IV, c. 49.

504 *Ibid*., rules 25 and 26. These rules gave effect to the *Slave Trade Act*, 1824 (U.K.), 5 Geo. IV, c. 113.

505 The unlikelihood of pirate ships or slave ships coming up the St. Lawrence was such that, when the 1832 Rules were printed that year by Carey & Co., Quebec printers, rules 23-26 were omitted.

506 1832 Rules, rules 15 and 16.

507 Libels had been filed in more complex or novel wage claims even before the new rules.

Although it might appear obvious, rule 9 of the 1832 Rules states that in cases of arrest of property or persons, competent bail must be given before the property or person is to be released. As every suit was initiated with a request for the issuance of a warrant of arrest of property or persons, or both, it would appear that suits where appearance was made without a warrant would be primarily limited to the voluntary appearance of a person interested in property already under arrest. For example, a shipowner would almost invariably not want his vessel sold by default unless liability were to be obvious, and quantum in excess of the value of the ship.[508] This begged the vexing question as to whether the appearance of the owner placed his assets that were not under arrest, in jeopardy of being taken in execution, should the bail provided to release the ship prove to be insufficient to pay the final judgment.

A contesting defendant was required to secure the amount claimed if he wished to obtain the release of the property arrested.[509] Sureties were usually required to be two, unless otherwise agreed or ordered, and their names, addresses and occupations had to be furnished to the marshal and the adverse proctor. The marshal then prepared a report on their sufficiency, following which the registrar prepared the bailbond to be signed in return for the release of the property.[510] The opposing proctor could contest the eligibility of a proposed surety, in which case the court decided. Shipowners were allowed to sign bail for their own property.

The 1832 Rules set out the principle rules of civil law pleading in instance cases, all of which were based upon the then accepted practices of the High Court of Admiralty in London. The general procedure of *plea and proof* required the claimant to prepare and file a libel and the

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[508] 1832 Rules, rule 10. The 1832 Rules state that should no appearance be given within two months of service of the warrant of arrest, the claimant could obtain a decree giving him a lien on the property under arrest. This is the first decree of the civil law, putting the claimant in possession of the property. Other creditors could do the same. See rule 10. The owner of the property could still contest the suit within one year of the return of the warrant upon paying the contumacy fees, which were the costs incurred to make the default motion and the charges for keeping possession of the property under arrest. Were the property to be perishable, a decree of appraisement and sale was immediately available. The marshal would in such cases be instructed to have the property appraised and inventorized, prepare a notice, hold an auction and return the proceeds to the registry.

[509] *Ibid*., rule 11. As noted above, Browne refers to bail being given to the admiral to ensure appearance and to the opposing party to secure the amount of any judgment on the merits. See *supra*, note 365. As bail to the marshal or even to the admiral would not likely be filed, it is unknown whether this was the practice in Ireland or a general admiralty practice. It does not appear to have been a practice in Quebec. The extant files in the Quebec Vice-Admiralty Court contain no reference to bail below and the forms appended to the 1832 Rules include no form of bail to be given for appearance.

[510] *Ibid*., rule 11.

defendant an answer.[511] The claimant could, if he so desired, request the personal answers of the defendant in which case the defendant must sign the answer himself.[512] Otherwise the answer was to be prepared by the defendant's proctor and the truth attested to by the affidavit of the defendant.[513] Either party might by motion object to the opposite party's pleading. If no answer was filed in the time set by the court, the plaintiff could obtain an attachment of the defendant for contumacy, but that would not be necessary where the defendant had filed a bailbond to cover the eventual decree.

In contested suits, defendants could contest the jurisdiction of the vice-admiralty court by filing an *act on protest*.[514] This was principally used where a defendant wished to argue that the event described in the suit took place within the body of a county and not on the high seas. In such cases, the court would uphold or overrule the protest. If overruled, the suit continued as a suit where no protest was made, but the ruling would not prevent the disgruntled defendant from seeking a writ of prohibition from the Quebec Court of King's Bench. However, although there were prohibitions issued in Quebec, the status of the vice-admiralty was never contested on a scale comparable to that in England. This was doubtlessly due to the fact that the jurisdiction of the High Court of Admiralty had already been reduced to its lowest ebb by the beginning of the period under review. Thus the vast majority of the suits filed in Quebec were incontestably within the jurisdiction of the English admiralty model.

Witnesses were examined in civil law on interrogatories and counter-interrogatories with answers taken verbatim in writing. Testimony was taken by questions put *viva voce* by the registrar.[515] However, the questions could include the witnesses' understanding of the positions or points of the libel as well as other questions suggested to the registrar by the proctor producing the witness. The answers of each witness were reduced to writing to be signed and sworn to by the witness. Cross examination continued to be by way of counter-interrogatories in writing produced to the registrar by the opposing proctor. Neither proctor would in theory be

511 *Ibid*., rule 12.
512 *Ibid*. But this was not available where naval prosecutions were tried. See rule 18.
513 *Ibid*., rule 12.
514 *Ibid*., rule 11.
515 *Ibid*., rule 13.

present while the questions were put, but in practice this rule was not always followed in Quebec, probably by the consent of the parties.[516]

Publication of the answers was to follow all witnesses being examined.[517] Should the defendant wish to enter an allegation or responsive plea to the libel, he must do so and produce his witnesses, if any, before the publication of all testimony taken on behalf of either party. Once published, each party received a copy of the testimony, but a party could only contest the admission of testimony where a contradiction was alleged. Any allegation of unworthiness of a witness had to be made before publication. The case was then set down for hearing.

By the time of the 1832 Rules, formal or definitive sentences were only required for derelict or piratical cases.[518] All other decrees were in a summary or interlocutory form.[519] Execution of a sentence or decree would require the defendant or his bail being first served with a monition to pay and, failing payment, an attachment would issue for contempt.

The second manner of proceeding is by *act on petition*. This was a shortened form of proceeding which required the consent of both parties. Instead of the usual pleadings by plea and proof, there was no formal libel, but only a statement of claim in simpler terms called an act on petition. As a rule, the defendant chose to request from the claimant an act on petition instead of a more formal libel, but the claimant was not obliged to chose this form if he desired the libel.[520] Where process was to be by act on petition, the pleading was to set out the facts without argument and then to conclude with the prayer for relief.[521] Each party was to plead by this method.

An act on petition required no *viva voce* witness evidence, but was supported by affidavit evidence, and counsel was not required to review the evidence.[522] There was no need to file a libel, although nothing prevented the step from being taken. In some salvage cases filed

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516 As it seems was also the case in Ireland. See the text accompanying note 381 above.

517 1832 Rules, rule 13.

518 *Ibid*., probably as these were Crown cases. However, Navigation Act cases were usually decided in Quebec by the issuing of a more formal definitive sentence.

519 *Ibid*. Forms 110 to 130, appended to the 1832 Rules, show the summary decrees in all other cases.

520 The 1832 Rules set out those suits which would generally proceed by act on petition, including salvage suits.

521 1832 Rules, rule 14.

522 *Ibid*., rules 11 and 14. The 1832 Rules were for the vice-admiralty courts throughout the British Empire. In Quebec, although the lawyers were referred to as proctors or advocates, depending on what role they were playing, in fact necessity dictated that all lawyers be eligible for both professions, and very few could afford to specialize as they could in England.

following the adoption of the new rules, summary petitions continued to be produced, although this was not provided for in the new practice.[523] Further, should a party delay the filing of its pleadings, the court could hear the case *ex parte* instead of requiring the arrest of the contumacious party, the logic being that the parties agreed to move the case along in this manner.

Proceeding by act on petition thus saved time and became common for possession claims between part owners, actions by a part owner for security for the safe return of the ship, as well as salvage claims where celerity was important, and also in cases on documents such as bottomry.[524] Act on petition is not however to be confused with summary proceedings. All admiralty proceedings were summary, even when on plea and proof, and formal pleadings, which involved repeated written pleas, were more common in ecclesiastical cases than maritime ones.

Thirdly, the 1832 Rules specify that for wage and pilotage fee claims, the libel is to be styled a *summary petition*. Wage proceedings and pilotage claims did not need to be settled by counsel, reflecting the fact that these cases were even more summary than suits by act on petition.[525] But, even prior to the 1832 Rules, summary petitions had become common in almost all types of claim in Quebec, probably because of the volume of wage claims dealt with by admiralty practitioners.

The term *in rem* was known at the time the 1832 Rules were adopted. However the term appears nowhere in the rules or in the comments on the rules. The 1832 Rules use the term *attachment* to speak of the arrest by court process of property or persons. Attachments were normally issued upon request by the claimant's proctor accompanied by an affidavit. However, in certain cases, attachments required an order of the court.[526]

The rules refer to *capture* or *seizure* where property is taken in possession without prior court order, such as by a captor of piratical vessels, or by the Crown where there has been a breach of

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523 See, for example, the salvage claim in *The Commerce*, QVA 762-33 (1833 QCVA), where a summary petition was filed in June 1833.

524 1832 Rules, rules 17, 19, 20 and 21.

525 *Ibid*., rules 15 and 16. Note that rule 15 specifies that "any number of mariners, not exceeding six" could join in one action for wages.

526 *Ibid*., rules 18 (suits for contempt in breach of maritime law), 20 (suits for possession), 21 (suits for security for the safe return of a ship) and 23 (suits against ships or property of pirates).

the laws for the abolition of the slave trade or the Navigation Acts.[527] These suits are similar in this aspect to prize suits except that prize was a matter of international law and the laws of war, and dealt with by prize courts, which, in British North America, at least from 1801, principally meant the Halifax Vice-Admiralty Court.[528]

The 1832 Rules refer to the types of redress that could be obtained from vice-admiralty courts in instance cases. In addition to arrest and an award of damages, these included possession of property, security for the return of property, bounty money for the capture of piratical vessels, and fines on prosecutions for the breach of maritime laws, slave trade laws or the Navigation Acts.

But court process could be met with resistance in Quebec, not only from the absence of the silver oar. In *The Benson*, the marshal's endorsement on the monition indicates that the defendant ship was at anchor and the crew refused to allow the marshal to board.[529] Service could also be ignored. In *The Woodman*,[530] the defendant vessel was duly arrested by the marshal, accompanied by a clerk of John Fletcher, the proctor of the wage claimant mariner Charles Lawrence.

However, following arrest, the master of the *Woodman*, Thomas Robson, simply cast off, threatening to "take both the lawyer and the marshal to sea" if they did not immediately disembark. They did, along with the master who anchored his vessel and said he would "put the matter into a train of arrangement" on shore. However, he apparently had no intention of arranging anything, and later sailed the ship under arrest. A second or *alias* monition was issued to arrest both the ship for the wage claim and the master for contempt of court, and the ship was again arrested at anchor prior to sailing, but the master was never found and thus could not be served. He was doubtlessly on board, as the ship sailed during the night without regard for either monition.

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527 *Ibid*., rules 24 (suits for bounty for the capture of piratical vessels), 25 (suits for breach of the slave trade laws) and 27 (suits for breach of the Navigation Acts).

528 See the *Prize Act*, 1801 (U.K.), 41 Geo. III, c. 96. See also *supra*, notes 469 and 484 and *infra*, notes 740, 802 and 857.

529 *The Benson*, QVA 64-11 (1811 QCVA). The marshal then served a copy on the master who was on shore but who also refused to allow the marshal to board. The court dismissed the defendant's argument that *in rem* service was irregular and the claimant, Joseph Jenkins, was successful in his claim for wages.

530 *The Woodman*, QVA 141-15 (1815 QCVA).

Service could involve the marshal removing the sails of the ship under arrest to prevent her from sailing. But this could result in contempt proceedings against the marshal. In *The Cossack*,[531] a claim for wages by mariner John Roberts, the vessel's owner, William Buchanan, filed a petition to have the marshal, Thomas Walsh, arrested for contempt of court. Buchanan argued that Walsh, having previously arrested the ship, had unlawfully returned a few days later, exhibiting no additional authority, to remove the sails with the assistance of the claimant and two of his friends. In the event, the master instead offered up the ship's patent or articles of registration as proof of his intention to obey the arrest. The marshal agreed, but the owner was unsatisfied.

The marshal explained in a deposition that the ship's master had been thrice called in court upon the return of the warrant, but had not appeared, and that Francis Ward Primrose, a leading advocate in Quebec and the claimant's proctor, had advised the marshal that he had seen in the *Quebec Gazette* that the letter bag of the *Cossack* was scheduled to close the following day, a sure sign of impending departure, and had warned the marshal that he would be liable should the ship sail. The marshal could not justify appointing a guardian, and had decided to take things into his own hands, given that the case was proceeding *in forma pauperis*.

Wage claims were often taken by mariners, few of whom had the financial wherewithal to hire a proctor. Consequently, in Quebec, the petitioner invariably alleged being a pauper, not worth five pounds, his wearing apparel excepted, and sought to be admitted to sue *in forma pauperis*, failing which he would lose his just right to claim .[532] To be admitted, the claimant had to swear to his poverty, and have his proctor agree to act for him and state that the petitioner appeared to have a good cause of action. If accepted by the court, the claimant paid no court fees, was required to provide no security for costs and owed no money to his proctor. However, the proctor

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531 *The Cossack*, QVA 316-23 (1823 QCVA).

532 The status was enacted by legislation. See *An Acte to admytt such persons as are poore to sue in formâ pauperis*, 1495 (U.K.), 11 Hen. VII, c. 12 as well as (1532), 23 Hen. VIII, c. 15, s. 3. These Acts were in force during the period under review and were only repealed by the *Statute Law and Civil Procedure Act, 1883* (U.K.), 46 & 47 Vict., c. 49. *In forma pauperis*, an early form of legal aid, was available to claimants in all royal courts including the High Court of Admiralty and in the vice-admiralty courts in all British colonies. For Quebec, see B.A. Testard de Montigny, *Histoire du droit canadien* (Montréal: Eusèbe Sénécal, 1869), at page 468, where the author explains that the status had been declared inapplicable in 1847 by the Quebec Court of Queen's Bench, resulting in the immediate re-introduction thereof by provincial statute (1849) 12 Vict. c. 43, codified as the *Administration of Justice Act*, R.S.L.C., c. 82, s. 24. The ruling and the statute would not affect the status before admiralty courts, applying English maritime law, even in Quebec. For more on *in forma pauperis* process, see the text accompanying note 983 below.

would expect to be paid out of the wages obtained if the claim was successful, and in that sense the arrest of the defendant ship would be of utmost importance, not only to the claimant, but for his proctor as well.

In *The Cossack*, the shipowner's petition against the marshal for contempt was dismissed, the court finding that the marshal had done his duty, but from the bill of costs on the contempt charges, it would appear that John Robert's claim for wages was also dismissed. Thus, although admitted to proceed *in forma pauperis*, and notwithstanding the successful arrest of the defendant vessel, neither John Roberts nor Francis Ward Primrose would have benefitted from the status.

The successful claimant could expect to see his judgment executed either against the ship or property he had had arrested, or against any surety who had filed bail to allow the property to be released. However, if a ship was in poor condition, it was not always possible for the master or owner to obtain bail. In such cases, the claimant could await judgment before having the defendant ship sold, or could move for the interlocutory sale of the ship by presenting a motion for perishable monition.

Judgment in absence of bail would be in the form of a first decree, ordering the defendant ship to be put in the possession of the claimant. Should the claimant not wish to wait another year for a final decree of ownership, he could move for interlocutory appraisement and sale. Sale following a first decree could be styled as a motion for perishable monition or as a petition for appraisement and sale. In effect, sale after a first decree would be an interlocutory remedy as the final decree was yet to be issued. Such remedies were rare in Quebec, given the nature of the majority of claims in vice-admiralty, i.e. claims for wages, usually representing but a fraction of the value of the defendant ship.

In *The Providence*,[533] the wage claimant chief mate, John Atkins, was awarded possession of the defendant ship by first decree and then moved to obtain a perishable monition for her sale, given the condition the ship was in. The sale could not succeed without the ship's register which was in the hands of John Goudie, a ship builder who had repaired the ship and held a bottomry bond to

[533] *The Providence*, QVA 89-12 (1812 QCVA).

secure payment of his services. A separate monition was addressed to Goudie to deliver up the register and the sale went ahead once the register obtained.

In the event, Goudie bought the ship for himself on October 31, 1812, therefore removing his repair claim against the proceeds of sale, but that did not remove the claims for wages of other mariners against the proceeds, or claims for salvage services. The other claimants were ordered to establish their claims. But by April 24, 1816 this had not been done for all other claimants, and the court ordered that it could not issue a final decree until this was done.[534]

In *The Resolution*,[535] the claimant mariner, John Denoven, obtained possession of the defendant ship by means of a first decree for slightly less than 20 pounds in wages. The record establishes that the ship sailed from Cork to Demerara with a crew of 13 and at least one passenger, John Casey, who filed a deposition in the suit. Seven crew members died in Demerara, and four others may have left, as Denoven and the master, Robert Brown, were said by Casey to be the only original crew members reaching Quebec.

The master of the *Resolution* apparently decided to return to Demerara instead of Cork, which is why Denoven issued suit for a discharge and wages. The master was unable to obtain bail and a first decree was issued. Thereafter, Denoven moved for appraisement and sale, alleging the perishable condition of the ship. Had the decree been final, no such evidence of the ship's condition would have been necessary. These cases illustrate not only the process of sale, but the steps required to obtain payment of a first decree where bail was unavailable.

Appeals from vice-admiralty decisions were available to the High Court of Admiralty in London, if asserted within 15 days of the decree to be appealed.[536] The appellant party would have to give bail for costs on appeal in the amount of £100. The party successful in the vice-admiralty could nevertheless seek execution notwithstanding appeal by giving bail for the value of the subject or property in dispute plus £100 to cover costs.[537] The appellant was required to obtain an inhibition order from the High Court of Admiralty as well as a monition to prepare and transmit a certified copy of the vice-admiralty proceedings and to pay the vice-admiralty registrar for its

[534] The order appears in the Quebec Vice-Admiralty Court register for April 24, 1816.
[535] *The Resolution*, QVA 236-20 (1820 QCVA). See also *The Henrietta*, QVA 240-20 (1820 QCVA).
[536] 1832 Rules, rule 35.
[537] *Ibid*. But this was not available for appeals relating to the slave trade.

preparation.[538] Several appeals were initiated following decisions of the Quebec Vice-Admiralty Court, but few were taken to judgment before the High Court of Admiralty.

Reform of High Court of Admiralty Process

The jurisdiction and practice of the High Court of Admiralty was not affected by the 1832 Rules which only applied in the vice-admiralty courts. Those rules were intended to harmonize the practice in vice-admiralty courts with the practice generally followed in the High Court. That practice had developed from the practice generally observed in the civil law courts in Europe and in England.

The English civilian practice, as described in Clerke's volumes, was largely uncodified, although James, Duke of York and Lord High Admiral of England and Ireland, had approved rules of practice following the Restoration, addressed to Dr. Leoline Jenkins, judge of the High Court of Admiralty.[539] Those rules were superseded by the king on March 9, 1678, and the new rules would still be in force almost two centuries later when the 1832 Rules were issued.[540] Even the 1678 rules were limited in their scope, but rules 3 and 4 referring to the arrest of ships "in point of property", allowed clamants to arrest ship, master and owner.

However, a series of changes in the jurisdiction and practice of the High Court of Admiralty took effect between 1840 and the end of the period under review. The changes commenced in 1840 with the adoption of an Act entitled *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England*.[541] The *Admiralty Court Act, 1840* expanded the jurisdiction of the court to include claims for mortgages on ships under arrest,[542] as well as claims to determine the ownership of, or title to ships, but only where the subject ship was involved in a suit of possession, salvage, damage, wages or bottomry.[543] The court was also granted jurisdiction over claims for salvage, towage and necessaries provided to foreign ships, whether

538 *Ibid*.
539 See the rules issued on November 20, 1668 in Hale and Fleetwood, *supra*, note 41, at page 310.
540 *Ibid*., at page 313. The 1678 rules were signed as accepted by 26 proctors and 11 advocates, presumably those most regularly involved in admiralty practice.
541 *Admiralty Court Act, 1840* (U.K.), 3 & 4 Vict., c. 65. The Act was tabled in the House of Commons as Bill 188 on April 1, 1840 and adopted on August 7, 1840.
542 *Ibid*., section 3.
543 *Ibid*., section 4. This power was for any action instituted after the coming into force of the Act.

within the body of a county or on the high seas.[544] The 1840 enactment also relaxed the rules of evidence by allowing *viva voce* testimony[545] and allowing witnesses to testify, even where they might have an interest in the outcome of another case based on the decision in the case in which they were to give testimony.[546]

The adoption of the *Admiralty Court Act, 1861*[547] again expanded the court's jurisdiction, although, as always, subject to certain restrictions. Thus the court could now entertain claims for disputes concerning the building, equipping and repairing of ships, but only where the subject ship was already under arrest at the time of the initiation of the suit,[548] claims for necessaries provided to any ship, except in its home port or where an owner was at the time of taking the suit domiciled in England,[549] claims on bills of lading for damage to imported cargoes, unless the shipowner was similarly domiciled in England,[550] claims of ownership, possession or title to any ship, as long as the ship was registered in England,[551] claims on ship mortgages as long as they were registered under the *Merchant Shipping Act*, *1854*,[552] whether the ship is under arrest or not, claims for limitation of liability under the same legislation,[553] claims for collision damage,[554] claims for life salvage, but only in the United Kingdom or on British ships abroad,[555] and claims for wages and disbursements of masters.[556] The 1861 enactment confirmed the High Court of Admiralty as a court of record[557] and specified for the first time that proceedings could be taken *in rem* or *in personam*.[558]

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544 *Ibid*., section 6. Claims for salvage and towage had been greatly increased with the advent of steam navigation in the 1830s.
545 *Ibid*., section 7. This was already allowed in vice-admiralty courts under rule 13 of the 1832 Rules.
546 *Ibid*., section 10, incorporating the *Administration of Justice Act, 1833* (U.K.), 3 & 4 Will. IV, c. 42, s. 26. That enactment, which applied to the common law courts, restricted the rejection of witnesses on the ground of interest in some ulterior case. The rule that one could not testify in his own case was not disturbed.
547 *Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10. The Act was tabled in the House of Lords as Bill 16 on February 14, 1861 and adopted on May 17, 1861
548 *Ibid*., section 4.
549 *Ibid*., section 5.
550 *Ibid*., section 6.
551 *Ibid*., section 8.
552 *Merchant Shipping Act, 1854* (U.K.), 17 & 18 Vict., c. 104 and *Admiralty Court Act, 1861*, section 11.
553 *Ibid*., Part IX and *Admiralty Court Act, 1861*, section 13.
554 *Admiralty Court Act, 1861*, section 7.
555 *Ibid*., section 9.
556 *Ibid*., section 10.
557 *Ibid*., section 14.
558 *Ibid*., section 35.

The express reference to proceeding *in rem* and *in personam* was possibly related to the 1851 decision of the Privy Council in *The Bold Buccleugh*,[559] where maritime liens and *in rem* actions arising from the *Admiralty Court Act, 1840* had been conflated, and to the several important regulatory changes had come about since that decision. Section 18 of the *Admiralty Court Act, 1840* had, for the first time, allowed the judge of the High Court of Admiralty to make rules for that court subject to the approval of Her Majesty in Council. A second Act of 1840[560] provided that the judge, register and marshal of the High Court of Admiralty would be paid a salary instead of fees, and allowed for a table of fees to be set by Order in Council.[561] A third enactment, the *Admiralty Court Act, 1854*, allowed her Majesty to provide for the collection of fees by means of court stamps.[562]

The *Admiralty Court Act, 1854* also introduced a very important procedural change by stating that any claim against a ship, freight, goods or other effects would no longer need to be commenced by suing out a warrant of arrest, but could proceed by monition against the owners of such property.[563] The terms *in rem* and *in personam* do not appear in the 1854 enactment, but prior to this enactment, all proceedings in admiralty were commenced by issuing a warrant of arrest of property or persons. This change does not however confirm that the court had no *in personam* jurisdiction at the time, but only that proceeding by arrest *in rem* would no longer be necessary. Nor did the 1854 legislation affect the vice-admiralty courts, which continued to operate under the 1832 Rules.[564]

In furtherance of the power to set fees and make them payable by court stamps, an Order in Council of December 11, 1854 was made, adopting a set of rules and a table of fees prepared by the admiralty judge, Dr. Lushington, providing for the purchase and affixing of stamps to

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

560 *An Act to make provision for the Judge, Registrar and Marshal of the High Court of Admiralty of England*, 1840 (U.K.), 3 & 4 Vict., c. 66.

561 *Ibid*., section 13. The same rule applied to vice-admiralty courts. Note that at Confederation, Canada agreed to pay the salaries of the British vice-admiralty courts in Canada. See the *Constitution Act, 1867*, *supra*, note 55, at section 100.

562 *Admiralty Court Act, 1854* (U.K.), 17 & 18 Vict., c. 78, s. 15.

563 *Ibid*., section 13.

564 The jurisdiction of the vice-admiralty courts was eventually expanded along the lines of the 1840 and 1861 enactments by the *Vice-Admiralty Courts Act, 1863* (U.K.), 26 & 27 Vict., c. 24 and by the *Vice-Admiralty Courts Act Amendment Act, 1867* (U.K.), 30 & 31 Vict., c. 45.

virtually all proceedings in admiralty.[565] On December 7, 1855 two further Orders in Council were made. A first, referring to the *Admiralty Court Act, 1854*, amended the table of fees,[566] and a second,[567] referring to the *Admiralty Court Act, 1840*, gave effect to changes to the rules proposed by Dr. Lushington. Both came into force on January 1, 1856.[568]

These new rules included the requirement in collision cases that the parties prepare and file preliminary acts setting out the particulars of the collision.[569] As concerns witnesses in cases proceeding by plea and proof, they required all pleadings to be concluded prior to witnesses being examined, and did away with the requirement of repeating before the court a witness to his deposition.[570] Moreover, for the first time, the parties' proctors, but not the parties themselves, were allowed to be present at the examination of witnesses, although the practice continued of having the registrar put written interrogatories to each witness, with answers taken down in writing.[571]

In 1859 there were two further changes brought to the practice of the High Court of Admiralty. First, on August 8, Parliament adopted legislation allowing common law lawyers, including serjeants-at-law and barristers, as well as attorneys and solicitors, to practice in the High Court of Admiralty, thus enjoying the same rights of audience as advocates and proctors respectively.[572]

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565 The rules took effect on January 1, 1855. See H.C. Coote, *A New Practice of the High Court of Admiralty of England* (London: Butterworths, 1860) [hereinafter Coote] at page 151. It is to be noted that section 2 of the 1854 rules refers to the Action Book of the High Court of Admiralty. Action Books were in fact Warrant Books. The only extant Action Book is that of 1858-59 and it is unknown whether earlier volumes existed and, if so, why they have not survived.

566 Coote, at page 159.

567 *Ibid*., at page 162.

568 *Rules, Orders and Regulations for the High Court of Admiralty in regard to Instance Cases*, December 1, 1855, at rule 11. See Coote at page 163.

569 *Ibid*., rule 2.

570 *Ibid*., rules 3 and 4. Prior to this change, witnesses for the claimant had to be heard before the claimant could move the defendant to file pleadings. Delays necessarily ensued.

571 *Ibid*., rules 6 and 7.

572 *An Act to enable Serjeants, Barristers-at-Law, Attorneys and Solicitors to practice in the High Court of Admiralty*, 1859 (U.K.), 22 & 23 Vict., c. 6. The advocates and proctors admitted to practice in the ecclesiastical courts or in the High Court of Admiralty continued to fulfil that role, but the serjeants, barristers, attorneys and solicitors would not need to seek permission to practice in the High Court of Admiralty. The Act did not affect practice in the ecclesiastical courts. It is interesting to note that the advocates of Doctors' Commons do not appear to have seen fit to petition the government against extending the rights of audience to the common lawyers, contrary to their efforts to secure certain aspects of the *Court of Probate Act*, 1857 (U.K.), 20 & 21 Vict., c. 77, including the right to surrender the charter of the College and to sell the property, as was eventually provided for in sections 116 and 117 of the probate enactment. See the minutes of meetings of the College held on February 23 and March 9, 1854, when the probate court changes were first proposed, in the book of minutes,

This would prove to be a momentous change, as the practice from then on would be influenced for the first time by the practice of the common law courts.

Secondly, on November 29, 1859 a new set of rules prepared by Dr. Lushington was approved by Order in Council to take effect on January 1, 1860.[573] The 1860 Rules made several changes to English admiralty practice.[574] They replaced the rules adopted in 1854 and 1855.[575] From a procedural point of view, the 1860 Rules created a new mode of commencing a suit. Whereas the civil law practice had always been for the claimant's proctor to enter the cause in the Warrant Book or Action Book, thereby requesting the issuance of a warrant of arrest of property or persons, in effect making a warrant of arrest the prerequisite for every suit,[576] the 1860 Rules changed this method by thereafter requiring the proctor to file a præcipe, whereupon the registrar

infra, note 1046, Lambeth Palace Library reference DC2, at pages 158-160. One of the advocates, Dr. Lee, was opposed to the surrender of the charter. See his memorial to the Visitors of The College of Advocates, included in a return to the Secretary of State dated June 9, 1858, U.K., H.C., "Communication (with papers) addressed on the 9th June 1858 to the Secretary of State for the Home Department, relating to the College of Advocates, Doctors' Commons", *Sessional Papers*, No. 16 (1859). Presumably, the advocates were unable to complain about rights of audience in 1859, as they had received the right to practice in the common law courts two years earlier by virtue of section 40 of the *Court of Probate Act*.

573 *Rules, Orders and Regulations for the High Court of Admiralty of England*, November 29, 1859 [hereinafter the 1860 Rules].The Order in Council was dated November 29, 1859. See Coote at page 171. The new rules included tables of fees and were made pursuant to the two 1840 enactments and to that of 1854 concerning stamps.

574 The 1860 Rules did not completely replace the traditional practice in the High Court of Admiralty and rule 3 states that the new rules amend but do not replace the practice in operation on December 31, 1859.

575 See rule 4. This included the rules and Orders in Council mentioned above, as well as a direction of Dr. Lushington dated December 31, 1855, concerning the printing of instance proceedings. The 1860 Rules did not affect prize procedure, nor did they affect the notice, issued on May 12, 1859 whereby a copy of the minute book was kept for the use of the public and of practitioners. The original minute books, presumably the Assignation Books now found in the National Archives, as the Minute Books now in the archives only begin in January 1860, were very much in demand. However, the notice gives a clue as to their creation, when it imposes an additional stamp fee of 2s 6d for all minutes not handed in by 16:00 hours the day on which they purport to have been done. This extra fee was not to be allowed on taxation. Presumably, the proctors prepared the minute to be copied by the registrar into the minute book. See Coote, at page 170.

576 As seen above, the proctors commenced each suit by the issuance of a warrant until the *Admiralty Court Act, 1854* allowed them the additional option of commencing the action by the issuance of a monition to the person or the owner of the property against which the claim was being made. This *in personam* process can be seen in the final Action Book for 1858-59, no earlier book existing for the years between 1854 and 1858. The 1858-59 Action Book contains monitions to persons, but no personal arrest warrants. However, the arrest of property *in rem* is still very much the dominant procedure. The number of *in rem* suits, as opposed to *in personam*, can only be calculated from the Warrant Books or Action Books prior to 1858. The admiralty registrar had reported to Parliament in 1833, and again in 1867, but neither differentiated between the types of suit. See *infra*, notes 630 and 631. It was only with the commencement of the tabulating of judicial statistics that calculations of citations were undertaken.

entered the cause in the Cause Book.[577] Each cause would now be numbered and the court number was to appear on each pleading.[578]

This is of course not to say that warrants of arrest were no longer available. Since the *Admiralty Court Act, 1854*, the claimant could commence a suit by monition, citing the owner of the property against which the claim was made to appear and defend the suit. Such a suit would proceed in the normal way, but would not require an arrest. For example, where a claimant was not concerned with the risk of executing a final judgment, where the goods were beyond the court's geographical reach, where the amount claimed made the obtaining and serving of a warrant an expensive step in the suit, or where the subject vessel could not be arrested due to its owners being domiciled in England, the claimant could proceed without obtaining a warrant.

This did not prevent the claimant from doing so at any stage of the suit, were for example the ship or goods to become available for arrest. Further, the 1860 Rules relaxed the requirement that a motion be made to obtain a warrant for the arrest of a ship in a cause of restraint or possession.[579] A claimant wishing to arrest, and fearing the property might be removed from the jurisdiction before the marshal could serve a warrant, could detain the property in the meantime by taking out a *detainer* at the same time as the warrant and serving it himself.[580] The detainer would only be effective until service of the warrant or for three days from its issue. It is unlikely that this procedure was popular, as the proctor would have the often unsavoury task of attending on the ship himself to effect service and inform the master that his ship was detained.

Where property was already under arrest, the 1860 Rules allowed another claimant to take out a citation *in rem* which was issued instead of a second warrant, and to cause a caveat release to be

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577 1860 Rules, rule 5. The Cause Books were unfortunately destroyed under the authority of a destruction schedule dated September 21, 1915. They commenced in January 1860 under the new rules, but a new set of Minute Books commenced at the same time, and are now in the National Archives under class HCA 27. The Minute Books are described in the archives as being more complete than the corresponding Cause Book entries, which is presumably why the latter were destroyed. The Assignation Books were thus replaced as the minutes of the High Court of Admiralty but, surprisingly, the final Assignation Book, piece HCA 7/56, includes entries for the years 1860 and 1861, followed by four folios with entries for January and February 1862, followed by two folios with entries from April 1864 concerning the ship *William Watson*. The Assignation Books were maintained in the chronological order of business before the court, whereas the Minute Books were designed to reserve a pre-numbered double page for each vessel or file, with continuations, should two pages prove to be insufficient, on later unnumbered pages in each bound volume.

578 1860 Rules, rule 6.

579 *Ibid*., rule 12.

580 *Ibid*., rule 15.

entered into a Caveat Release Book.[581] This procedure was new, and the 1860 Rules do not explain what happened where the first arrest was released. In modern practice the next claimant has to then issue a warrant and the ship is re-arrested.

The 1860 Rules did away with the ancient civil law practice of obtaining first decrees or perishable monitions upon the default of an appearance in *in rem* actions.[582] In its stead, after 12 days of default, the claimant's proctor could file a præcipe and take out a notice of sale to be published in at least two public journals.[583] If no appearance was filed within six days of publication, the proctor could file an affidavit and obtain from the judge an order of appraisal and sale.[584] Following sale, the proceeds were returned to the registry and the proctor would then file his proofs and have the cause set down for a hearing.[585] In causes where sale was not appropriate, such as suits for the possession of a ship, the advertisement announced the proceedings only, and six days later if no appearance had been entered, the proctor proceeded in the same manner, seeking a decree of possession only.[586]

The 1860 Rules also set new procedures for *in personam* actions. Instead of issuing a monition to appear and defend the action, the new process was for the proctor to file a præcipe and an affidavit to obtain a citation *in personam* to be served by the claimant's proctor.[587] If no appearance was filed within 12 days of the return of the citation, the proctor could have the suit set down for a hearing.[588] The judge could issue a decree and enforce its payment by monition and even by the attachment in execution of the party cited.[589]

Whereas the former practice had been that a defendant wishing to appear would provide bail to the mandatory warrant issued by the claimant, the 1860 Rules provide for the defendant to serve and file a præcipe, upon which the registrar would enter an appearance in the Cause Book.[590]

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581 *Ibid*., rule 16.
582 *Ibid*., rule 18.
583 *Ibid*., rule 19. The journals were selected from a list prepared by the judge.
584 *Ibid*., rule 21.
585 *Ibid*., rule 23.
586 *Ibid*., rule 26.
587 *Ibid*., rule 28. Once served the citation was to be returned to the registry.
588 *Ibid*., rule 33.
589 *Ibid*., rule 34.
590 *Ibid*., rule 35. The Cause Books were destroyed in 1915. See above, note 577. A defendant wishing to contest the jurisdiction of the High Court of Admiralty could protest, in which case the appearance would be

Bail, where an arrest had been effected, could still be supplied as before, generally by two sureties, following the report of the marshal on their solvency.[591] Upon the filing of the bail bond, the arrest would be released, unless a caveat release was filed in the Caveat Release Book.[592]

A party wishing to prevent the arrest of any property, could file a præcipe undertaking to appear and file bail in the amount stated in the præcipe, in which case a caveat would be entered in the Caveat Warrant Book.[593] Where this was done, the claimant having a claim against the property would serve and file a præcipe and, where the sum claimed was less than the amount of the caveat arrest, the party filing the caveat was required to give bail or pay into the registry the amount claimed within three days, failing which the claimant could proceed by default.[594]

Judgment by default would be accompanied not only by the arrest of the property, but by the attachment of the caveator for "contumacy and contempt".[595] However, the absence of arrest during the intervening period and the possibility that the property might disappear or be sold limited the attraction of caveat warrants. As in the case of a caveat arrest, nothing prevented a claimant from taking out a warrant of arrest notwithstanding the caveat, but such a claimant would be liable for all wasted costs.[596]

The 1860 Rules abolished the former modes of pleading by plea and proof and by act on petition.[597] These were replaced by a single mode of pleading with the claimant's claim document called a petition, the defendant's reply an answer, followed by a reply and rejoinder.[598] Either proctor could waive his right to plead further by filing a conclusion praying that the

conditional. The defendant would then file a petition on protest, similar to the former act on protest. See the text accompanying note 514 above.

591 *Ibid*., rule 40.

592 *Ibid*., rule 51.

593 *Ibid*., rule 56.

594 *Ibid.*, rule 59. Note that the default could only be obtained 12 days after the filing of the præcipe, and during the intervening period the property was not under arrest.

595 *Ibid*., rule 60 and Form No. 60.

596 *Ibid*., rule 61.

597 *Ibid*., rule 65.

598 *Ibid*., rule 66.

pleadings be concluded.[599] Following the conclusion of pleadings, witnesses were now to be examined either by written depositions or by examination in open court.[600]

However, even where witnesses were examined by written deposition, the examination before the examiner or commissioner was now conducted by counsel or by the parties' proctors, although the claimant's proctor could apply to the court to have the examiner conduct the examination in chief.[601] Evidence could, on the application of either proctor, be taken by a short-hand writer.[602] Where a cause was to proceed by oral testimony of witnesses only, the new rules allowed the claimant's proctor to set the cause down for a hearing as soon as printed copies of the pleadings were filed.[603]

The 1860 Rules abolished the practice of porrecting bills of costs and replaced them with taxation by the registrar, along the lines of what was done in the common law courts.[604] The new rules also created the Caveat Payment Book, where a caveat against paying out of the court money earned by the sale of property could be entered.[605] The 1860 rules continue the practice of having the proctors fill in a printed form in the registry, indicating the nature of the document filed.[606] This form, called a minute, was then entered in a Minute Book by the registrar.[607]

The 1860 Rules were the last comprehensive rules of practice issued for the High Court of Admiralty prior to the end of the period under review in this enquiry, and prior to the merger of the courts of justice in England in 1875.[608] However, the practice of the vice-admiralty courts abroad continued to evolve, even though, at no time thereafter, were the rules of vice-admiralty practice identical to the contemporaneous rules of practice of the High Court of Admiralty.

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599 *Ibid*., rule 74.
600 *Ibid*., rules 78 and 80.
601 *Ibid*., rule 90.
602 *Ibid*., rule 94.
603 *Ibid*., rule 104. Rules 96-102 provided for the printing of cases, replacing the printing direction issued by Dr. Lushington on December 31, 1855. See Coote, at page 167. That direction and the 1860 Rules provided for 150 copies to be printed, including copies for the proctors, for the High Court of Admiralty and for any possible appeal.
604 *Ibid*., rule 121.
605 *Ibid*., rule 130.
606 *Ibid*., rule 160.
607 The Minute Books from January 1860 are found in class HCA 27 in the National Archives.
608 *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66. The Act came into force on November 1, 1875.

The first change of import came into force for the vice-admiralty courts on January 1, 1860, the same day as the 1860 Rules came into force for the High Court of Admiralty.[609] Section 1 provided for the preparation of preliminary acts in collision cases. This had been introduced in the High Court of Admiralty practice in the 1855 rules and was then superseded by rule 62 of the 1860 Rules for that court.

The 1860 Vice-Admiralty Rules also provided for witnesses to be examined *viva voce* in open court, or on interrogatories.[610] This change came into force on the same day for the High Court of Admiralty pursuant to the 1860 Rules.[611] Proctors could attend where the examination was on interrogatories, but not the parties themselves, and the witnesses were no longer required to repeat their testimony before the judge.[612] These changes had been made for the High Court of Admiralty in the 1855 rules.[613]

Some changes required legislation. Two enactments come near the end of the period under review. The *Vice-Admiralty Courts Act, 1863*[614] replaced the previous vice-admiralty enactments, including the 1832 Act. The jurisdiction of vice-admiralty courts was extended to include claims for masters' wages,[615] ownership, possession, employment and earnings of a ship,[616] necessaries supplied to ships with foreign owners,[617] and claims for the building, equipping and repairing of such ships.[618] Statutory jurisdiction over Navigation Act cases, abolition of slave trade cases and piratical cases was retained.[619] The 1863 Act retained the prior rules of practice, as reflected in

609 *Additional Rules and Regulations for the several Courts of Vice-Admiralty abroad*, (London: Eyre and Spottiswood, 1859) [hereinafter the 1860 Vice-Admiralty Rules].
610 *Ibid*., rule 7.
611 1860 Rules, rule 78.
612 1860 Vice-Admiralty Rules, rules 6, 10, 11 and 12.
613 Rules of December 1, 1855, rules 4, 6 and 7.
614 *Vice-Admiralty Courts Act, 1863* (U.K.), 26 & 27 Vict., c.24 [hereinafter the 1863 Act].
615 Masters' wage claims had traditionally not been of the jurisdiction of admiralty courts, but were given to the High Court of Admiralty and all vice-admiralty courts by the *Merchant Shipping Act, 1854* (U.K.), 17 & 18 Vict., c. 104, s. 191.
616 This had been given to the High Court of Admiralty in the *Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10, s. 8.
617 This too was in the 1861 enactment, at section 5.
618 This was in the 1861 enactment, but only where the ship was already under arrest at the time of instituting the action. The 1863 Act required no such prior arrest, but limited claims to ships with foreign owners.
619 1863 Act, section 12.

the 1832 Rules and the 1860 Vice-Admiralty Rules, notwithstanding the repeal of their enabling legislation.[620]

The 1863 Act was amended in 1867,[621] the most prominent change being the extension of rights of audience to barristers and of rights of practice to attorneys and solicitors of the superior courts of a British possession.[622] This had been achieved in the High Court of Admiralty in 1859.[623] But in most British overseas possessions lawyers were scarce, and rarely sufficient to create segregated groups, and the effect of this addition was probably minor.

The year 1867 marks not only the end of the period under review in this enquiry, but the creation of Canada as a country. As has been seen, jurisdiction over shipping and navigation was assigned to Canada's Parliament. However, admiralty jurisdiction would remain with the United Kingdom until 1890, when the Exchequer Court of Canada would take over from the vice-admiralty courts. The inheritance of admiralty jurisdiction brought with it the limits of jurisdiction that had traditionally plagued the English admiralty following the centuries-long struggle with the common law courts. It wasn't until the *Statute of Westminster, 1931* that Canada would be free to assign admiralty jurisdiction to its own courts, but by then the limited admiralty jurisdiction had been in place in Canada for so long that the only idea that came to mind was to copy the English list of admiralty powers and assign them to the Exchequer Court.

Things in England were only somewhat different. The merger of the courts in 1875 left behind the quarrels for jurisdiction, but the assignment of jurisdiction to the new admiralty division was still limited. To this day, the admiralty court cannot hear a claim on a marine insurance policy. But things could have been different both for England and for Canada. In 1867 another piece of legislation was under study in the British Parliament.

A bill was tabled in the British House of Commons on February 18, 1867, to extend the jurisdiction of the admiralty.[624] The proposed *Admiralty Jurisdiction Act, 1867* would have

620 1863 Act, section 24.
621 *Vice-Admiralty Courts Act Amendment Act, 1867* (U.K.), 30 & 31 Vict., c. 45.
622 *Ibid*., section 15.
623 *An Act to enable Serjeants, Barristers-at-Law, Attorneys and Solicitors to practice in the High Court of Admiralty,* 1859 (U.K.), 22 & 23 Vict., c. 6
624 *A Bill for extending and regulationg the Jurisdiction of the High Court of Admiralty, and for conferring Admiralty Jurisdiction on the County Courts*, Bill 28, brought in by the Attorney-General on February 18, 1867.

repealed those portions of the *Admiralty Court Act, 1840* and of the *Admiralty Court Act, 1861* that restricted the High Court of Admiralty's jurisdiction to determine title to any vessel,[625] to hear claims for the building, equipping or repairing of ships,[626] to determine limitation of liability,[627] and to hear claims for necessaries or for loss or damage to cargo.[628] The bill would also have extended the court's jurisdiction to any claim of a civl and maritime nature, expressly including the carriage of goods, insurance and general average.[629]

On May 23 and May 28, and again on June 5, 1867, while studying the proposed legislation, the House of Commons requested that the admiralty registrar indicate the progress made and fees charged by the High Court of Admiralty since the legislation of 1840, as well as the number of warrants issued since that of 1861.[630] The House also requested a memorandum on the jurisdiction and practice of the court. The registrar, Henry Rothery, son of William Rothery, the court's registrar in Stowell's time, responded to these requests on May 2,[631] on June 3,[632] and on

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625 *Admiralty Court Act, 1840*, (U.K.) 3 & 4 Vict. C. 65, s. 4 limited such determination to causes of possession, salvage, damage, wages or bottomry.

626 *Admiralty Court Act, 1861*, (U.K.) 24 Vict., c. 10, s. 4 limited this jurisdiction to ships already under arrest.

627 *Ibid*., s. 13 limited the determination to ships already under arrest.

628 *Ibid*., ss. 5 and 6 limited such jurisdiction to claims not involving English owners.

629 Bill 28, *supra*, note 624, s. 5.

630 This request may seem strange, but at the time judicial statistics were just beginning to be tabulated. Judicial statistics for criminal proceedings had commenced in 1840, but none were gathered for the other courts. On March 3, 1856, Lord Brougham made an impassioned speech in the House of Lords, lamenting the absence of judicial statistics for civil matters and presenting a lengthy resolution requesting, among other things, that the High Court of Admiralty give returns of "the number of causes instituted, distinguishing proceedings *in rem* and *in personam*". See U.K., H.L. Deb. (3 march 1856), vol. 140, cols. 1674-1699. On May 9, 1856, Lord Brougham presented Bill 104 to the House of Lords, entitled *An Act making Provisions for the Collection of Judicial Statistics*.The bill would have obliged the Secretary of State for the Home Department to ensure that judicial statistics were obtained. The bill does not appear to have gained traction, probably because the resolution was agreed and effectively the Secretary added the civil courts to the list of courts gathering statistics. See the preliminary report appended to Part II of the Judicial Statistics for 1857. From 1858, statistics were collected, including the number of *in rem* and *in personam* suits instituted in the High Court of Admiralty. But the figures were not collected retrospectively, and Rothery's figures for 1840 to 1858, although not differentiating between the types of suit, are all the more valuable as Warrant Books for those years do not exist. The House of Commons had made a similar request on April 23, 1833 for an account of the number of causes tried in the High Court of Admiralty from 1792 to 1832. See U.K., H.C., "Accounts of the salaries paid to the judge of the High Court of Admiralty of England, in the year 1792; of the retired allowances paid in the same period; and, of the number of causes tried in each year since 1792, and the number of days the court has sat for business", *Sessional Papers*, No. 230 (1833). However, the figures in that report included prize matters, all important during the wars with the French, whereas Rothery's 1867 report, from the description of types of suit, was for instance business only.

631 See U.K., H.C., "Statement made by the Registrar of the High Court of Admiralty of England to Her Majesty's Principal Secretary of State for the Home Department, showing the progress of the High Court of Admiralty since the year 1840; and, of a Memorandum on the jurisdiction and practice of the High Court of Admiralty of England", *Sessional Papers*, No. 375 (1867).

June 8.[633] In the first, he included his memorandum on jurisidiction. Rothery explains the process of the court on act on petition and on plea and proof and comments on delays resulting from witness evidence being put in one party at a time, with neither the parties nor their proctors in attendance.

Rothery also laments that the court had seen a part of its ancient jurisdiction restored in the 1840 and 1861 enactments, but that it was very far from possessing all that civil jurisdiction that it once had "which extended over all causes civil and maritime, a term well understood by all writers on admiralty law."[634] Rothery understood that to be the intent of the bill. Rothery had earlier published comments on admiralty practice, which had recommended changes, some of which were adopted in the *Admiralty Court Act, 1861*.[635]

Whatever the intent of Bill 28, it was never to be adopted, and would not have affected the vice-admiralty system during the period under review. Had it become law, it might have greatly affected that system in subsequent legislation. At the end of the period under review, the vice-admiralty system was in its final phase. The only vice-admiralty courts left were in the colonies, including Canada. The vice-admirals of the coast in the United Kingdom had fallen into ancient history and the admiralty courts of the seaports, which had exercised maritime jurisdiction since the middle ages, had been swept away by 1835, with the exception of the oldest of them all, the Cinque Ports.[636] The ancient admiralty jurisdiction of that court still exists.[637]

In 1868[638] the English county courts were given limited local admiralty jurisdiction and the following year they were expressly granted jurisdiction to proceed *in rem* or *in personam*.[639]

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632 See U.K., H.C., "Returns of the number of causes entered, the number tried, and the amount of fees received in the High Court of Admiralty in each year since 1840, with a statement of any alterations made during that period in the scale of fees; and, of the number of subordinate officers of every kind connected with the High Court of Admiralty, and their salaries or emoluments", *Sessional Papers*, No. 359 (1867).

633 See U.K., H.C., "Return of the number of warrants sent by the Marshal of the High Court of Admiralty to the collectors of Her Majesty's customs, during seven years prior to 1867, specifying the number sent to each port; and, of the number of warrants executed by the Marshal of said court in the port of London during the same time", *Sessional Papers*, No. 365 (1867).

634 Rothery, *supra*, note 631, at page 8.

635 *Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10. See H.C. Rothery, *Suggestions for an Improved Mode of Pleading* (London: Butterworths, 1853).

636 *Municipal Corporations Act*, 1835 (U.K.), 5 & 6 Will. IV, c. 76, s. 108.

637 See William Holdsworth, *A History of English Law*, vol. I, 7th ed. (London: Methuen, 1956), at page 533. See also *Cinque Ports Act, 1855* (U.K.), 18 & 19 Vict., c. 48, s. 10.

638 *County Courts Admiralty Jurisdiction Act, 1868* (U.K.), 31 & 32 Vict., c. 71.

Again, the admiralty jurisdiction of the Cinque Ports was excepted.[640] The county courts were however instructed to proceed in the manner in which they were accustomed for civil causes.[641]

The final set of rules of practice for British vice-admiralty courts abroad came after the period under review and only a few years prior to the end of the vice-admiralty system in 1890.[642] The 1884 Rules, established by Order in Council dated August 23, 1883, were adopted pursuant to the 1863 Act.[643] New rule 2 stated that actions shall be of two kinds, actions *in rem* and actions *in personam*, and rule 5 stated that all actions were to be commenced by the issuing of a writ of summons, the English common law method since 1832.[644] Clearly, no arrest of persons was retained, although rule 172 preserved the court's power to attach persons for contempt. The 1884 Rules are otherwise similar to the rules of the now merged Supreme Court and, for example, the examination of witnesses before trial in rule 99 allowed not only the proctors but the parties to attend the examination, as in the civil practice of the other branches of the merged courts.

By the end of the period under review in this enquiry, the admiralty courts in England and in the colonies were aligned with the common law practice in most matters, and the ancient civil law procedure was but a shadow of its former self. Internationally, the vice-admiralty system would terminate in 1890, when the local colonies were empowered to create their own admiralty courts and make rules of proceedings in them.[645]

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639 *County Courts Admiralty Jurisdiction Amendment Act, 1869* (U.K.), 32 & 33 Vict., c. 51, s. 3.

640 *County Courts Admiralty Jurisdiction Act, 1868* (U.K.), 31 & 32 Vict., c. 71, s. 33.

641 *Ibid*., section 10.

642 In that year the *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27 transferred admiralty jurisdiction to local courts in the colonies. In Canada the Exchequer Court was given admiralty jurisdiction by the *Admiralty Act, 1891*, S.C. 1891, c. 129.

643 *Rules for the Vice-Admiralty Courts in Her Majesty's Possessions Abroad*, O.C. August 22, 1883 [hereinafter 1884 Rules]. This final set of rules for vice-admiralty courts came into force on January 1, 1884. They can be found in several places, but especially in William Cook's publication of the decisions of George Okill Stuart, judge of the Quebec Vice-Admiralty Court from October 1873 to his death in March 1884. See William Cook, *Cases in the Vice-Admiralty Court at Quebec* (Montreal: Lovell & Son, 1885), at page 384. This was the final volume of Quebec Vice-Admiralty Court cases, following Stuart's own two volumes, referred to in the text accompanying note 733 below, but a few cases from the court continued to be published from time to time in the 17 volumes of the *Quebec Law Reports* published between 1875 and 1891. However, none of the cases in that series makes reference to the 1884 rules of practice which would have applied from 1884 to 1891 when the Exchequer Court of Canada became the national admiralty court.

644 *Unity of Process Act*, 1832 (U.K.), 2 Will. IV, c. 39.

645 *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27, s. 10. However, note that pursuant to section 7 of the Act, no rules for colonial courts of admiralty, including Canada's Exchequer Court, could come into force without the approval of Her Majesty in Council. Accordingly, Canada obtained an order in council

The reforms of the nineteenth century, both in England and in Quebec, brought admiralty procedure to its present configuration for both *in rem* and *in personam* process. The enactment of the *Admiralty Court Act, 1854* would change admiralty practice forever. No longer was it necessary to commence an action with the issuing of a warrant of arrest. Rather, any admiralty action could thereafter be commenced by a citation to the owner of the subject ship or property at the centre of the action. This was the true commencement of *in personam* actions in admiralty as the term is known today.

Further, the arrival of the common lawyers before the High Court of Admiralty in 1859, and the the changes brought about in the 1860 Rules for that court, led to the standardization of procedure along the lines of the common law courts. Similar changes would be made to the vice-admiralty courts in 1867. The principal feature remaining from the civilian period was *in rem* process. But the changes brought about by the 1832 Rules, the 1860 Rules and even by the 1884 Rules only illustrate the end point of the period under review. It is necessary to explore the effect of these changes on admiralty process in order to better grasp how that process was developed.

The absence of reported cases and especially of reliable judicial statistics, combined with the shortage of authoritative maritime law texts, leave the better part of the period under review in the dark as to the development of *in rem* process. Roman law has been eliminated as the source for all but the name of this process, and continental civil law, including French customary law is too removed from English admiralty process to bridge the gap. Foreign attachments and common law mesne process might have been relied upon by the federal courts in the United States as a source for Rule B attachments, but cannot explain the origin of true *in rem* process.

All that is left is the records of the admiralty courts. They are the original source of reliable information but have been left undisturbed for centuries. The second part of this enquiry will include the review of these records, in view of gaining a better understanding the development of *in rem* process in admiralty.

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from Queen Victoria on March 15, 1893, upon the recommendation of the Lords Commissioners of the Admiralty in London, giving effect to the 1892 rules of practice in admiralty for the Exchequer Court. An amendment to the rules was similarly approved by England on June 25, 1903. This requirement would only be removed by the *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, s. 6, reprinted in Canada, R.S.C. 1985, Appendix II, no. 27.

PART II
ADMIRALTY PRACTICE:
THE ANALYSIS OF MARITIME ARCHIVAL SOURCES

The second part of the present enquiry will focus on the development of *in rem* process in the admiralty courts of Quebec City during the period under review. In order to do so, it is not possible to rely solely on published admiralty decisions, as publication would only get underway at the beginning of the nineteenth century. Nor were judicial statistics collected or published. Rather, it has been necessary to review in detail all extant records of the admiralty courts of the French regime and those of the vice-admiralty courts of the British regime. The part will commence with a description of what these records are and how they have been analysed to extract the information they contain.

As will be demonstrated, the French regime applied the maritime law and procedure of the admiralty courts of France, which made more liberal use of seizures before judgments than did the civil courts of France. The British vice-admiralty courts were also somewhat more autonomous than the High Court of Admiralty in London. The records of these courts will demonstrate the jurisdiction actually exercised in Quebec and the development of *in rem* process. But vice-admiralty records are best understood when compared to the London court's records and a parallel review of the records of the High Court of Admiralty has been undertaken to bring the Quebec experience into perspective.

The review of these records will help to respond to the queries set forth in the introduction, including the enigmatic question of the personal jurisdiction of all British admiralty courts. But in order to understand these records, a description is required of the materials consulted as part of this enquiry.

The enquiry began with queries made with Canada's federal archives, now called Library and Archives Canada (LAC), and with the archives of the Province of Quebec, now called Bibliothèque et Archives nationales du Québec (BAnQ), in view of determining what had become of the records and papers of the French courts of admiralty from 1700 onward, and of those of the Quebec Vice-Admiralty Court of the old province of Quebec, before its division into

Upper and Lower Canada in 1791, and from then until Confederation in 1867. These dates determined the period under review.

It was feared that the many of the French records had been repatriated to France at the time of the conquest and that the British records, if not in the old courthouse offices in Quebec City or in the BAnQ archives, must have been lost in the courthouse fire of 1873. As it turned out, this fear was for the most part unfounded.

The records of the French admiralty courts in Quebec had been partly lost, but much remained in the BAnQ archives. And although some records and files of the Quebec Vice-Admiralty Court had indeed been lost in 1873, much had remained with the offices of the Exchequer Court of Canada in the old courthouse on St. Anne Street in Quebec City. The Exchequer Court had become Canada's colonial court of admiralty in 1891.[646] The records were some time thereafter sent to the Ottawa offices of the Exchequer Court of Canada, renamed the Federal Court of Canada in 1970[647], which then had its headquarters in a portable building next to the Supreme Court of Canada building.

The Quebec Vice-Admiralty Court records were stored in the vaults of the Supreme Court until the 1980's, when it became necessary for the Supreme Court to start moving its vast library collection into the vaults to allow for more office space, at which time the records and files were moved to the storage area of the Federal Courts in Gatineau[648].

As has been stated, Quebec is an ideal forum to study the admiralty action *in rem* given its links to the civil law and to the common law. Quebec City boasts the oldest permanent admiralty courts in Canada and has seen admiralty litigation in maritime courts since the end of the seventeenth century. As a product of colonization of France and then of England, Quebec has inherited the process of the admiralty courts of Europe. The study of the admiralty action *in rem* mandates a study of the records of the admiralty courts and of admiralty process inherited from France and the United Kingdom.

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646 Pursuant to the *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict. c. 27.
647 *Federal Court Act*, S.C. 1970-71-72, c.1.
648 The records have more recently been again moved to the preservation centre of the LAC in Gatineau.

The Records of the Quebec Court of Admiralty

The French established a permanent presence and a government in Quebec City in 1608 and established Canada's first permanent specialized admiralty court there in 1719. However, cases of maritime flavour existed long before a specialized admiralty jurisdiction was introduced.

The Quebec court system was modeled on the French system of justice and included the royal Court of Prévôté, similar to the Prévôté et Vicomté de Paris. The Prévôté in Quebec City was expanded shortly following the introduction of the Ordonnance of 1681[649] to be called the Court of Prévôté et Amirauté whenever maritime matters were considered. However, the Prévôté was a local jurisdiction, and similar courts were set up for Trois-Rivières and Montreal[650], whereas the Quebec City court's admiralty side heard cases for all of New France.

The Treaty of Utrecht in 1713 saw a great part of French Canada ceded to the British, including Acadia, except for Isle Royale, or Cape Breton Island. There, the French built Louisbourg as a fortress and administrative capital. A local admiralty court was created in Louisbourg, especially due to the fisheries that surrounded the island.[651] However, the island administration was seen to be a dependence of the Quebec authorities, and appeals to France from admiralty decisions in Louisbourg often ended up in Quebec.[652]

The first references to Prévôté et Amirauté appear in the late 1600's following the introduction of the Ordonnance of 1681. There are no independant seventeenth-century registers of admiralty hearings extant, but there are fragments of pleadings and appeals to the Conseil supérieur which heard appeals from all courts in Quebec. The Conseil, originally called the Conseil souverain, was created in April 1663 by royal edict to be, amongst other things, a court of final resort in all

649 Ordonnance of 1681, *supra*, note 268.

650 The Prévôté of Montreal was created in 1693, as that was the date when the seigneurs of Montreal, who had been given jurisdiction to set up all courts on the island, assigned their jurisdiction to the Crown. See Jean-Baptiste Gareau, "La Prévôté de Québec" in the *Rapport de l'archiviste de la Province de Québec, 1943-44*, pages 49 *et seq*. [hereinafter *La Prévôté de Québec*].

651 Louisbourg was given a Conseil supérieur to hear appeals from its admiralty court, much like Quebec City.

652 See R.J. Valin, *Commentaire sur L'Ordonnance de la Marine* (La Rochelle : Legier, 1776), vol. 1 at page 408. Appeals from the Louisbourg Conseil supérieur went to the Conseil d'État in Paris, which often redirected the appeals to Quebec City. The Louisbourg courts ceased activity in 1758 when Wolfe captured the island. The records of the Louisbourg admiralty court were repatriated to France, and are today in the Archives of the Marine in Paris, but the completeness of the records remains to be investigated. See also Buffet, *Z^{1D}: Amirauté de France*, *infra*, note 677 at page 274, also referred to *infra*, in note 698.

civil and criminal matters[653]. Final that is, for New France, but a review by the French Conseil d'État was always possible in theory[654].

As in France, the judges of the Prévôté were styled lieutenants. In Quebec they were appointed by the Compagnie des Indes Occidentales starting in 1664[655]. Lieutenants had jurisdiction over issues of navigation, civil and criminal,[656] according to the Custom of Paris[657]. But that jurisdiction would only last until the adoption on January 12, 1717 of the *Règlement concernant les sièges d'amirauté*.[658] Following 1717, in Quebec as in France, the courts of admiralty were, at least in theory, governed by the Admiral of France, and were not in that sense royal courts. Judges were appointed upon the recommendation of the admiral.[659]

Prior to the adoption of the Règlement of 1717, the lieutenants of the Prévôté heard cases of a marine nature, and in so doing styled themselves as lieutenants de la Prévôté et l'Amirauté. These constitute the first references to admiralty in Quebec. The references are to be found in the registers of decisions of the Prévôté and in the registers of the Conseil supérieur on appeal from decisions of the Prévôté. The first references appear shortly after the adoption of the Ordonnance of 1681. However, the first document that could be said to contain admiralty cases and thus to be a precursor of an admiralty register, dates from the beginning of the period under review in 1701.[660]

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653 *Édits et Ordonnances*, *supra*, note 251, at page 37. Several authors have written on the Conseil souverain and the Conseil superieur, including J. Delalande, *Le Conseil Souverain de la Nouvelle France*, *supra*, note 259. Delalande states, at page 69, that the Conseil supérieur heard no cases in first instance following the creation of the Prévôté de Québec, but that is contested by Gareau in *La Prévôté de Québec*, *supra*, note 650, at page 56. The records confirm according to Gareau that the Conseil continued, from time to time, hearing cases in first instance which would normally have been sent to the Prévôté.

654 There is no Quebec maritime case that has come to the author's attention as having been appealed to the Conseil d'État.

655 *La Prévôté de Québec*, *supra*, note 650, at pages 52 *et seq*.

656 *Ordonnance établissant la Compagnie des Indes occidentaux*, *Édits et Ordonnances*, *supra*, note 251, at page 46, article XXXI. This would later include the jurisdiction conferred by the Ordonnance of 1681.

657 *Ibid.* at page 46, article XXXIII. For the Custom of Paris, see *supra*, note 270.

658 The *Règlement concernant les sièges d'amirauté* [hereinafter Règlement of 1717], *Édits et Ordonnances*, *supra*, note 251, at page 358.

659 The office of Admiral of France had seen a checkered history and by 1717 was only an honorific title. Appointed admiral of France at the age of five in 1683, the Count of Toulouse, Louis-Alexander de Bourbon, son of Louis XIV, would be succeeded in turn by his son, Louis-Jean-Marie de Bourbon, duke of Penthièvre, in 1737. He would be the last Admiral of France, as the office went into abeyance at the time of the French Revolution.

660 BAnQ reference TL5, D4229-16.

The document consists of one sheet of paper approximately 14 × 18 inches folded twice. The writing is in a fair hand and contains a selection of seven admiralty cases decided on April 8, 1701 which were supposed to be entered in an admiralty register. At least, on the back sheet is marked "*aud[ien]ce du vendredi [*sic*] 8 avril à porter sur le registre de l'amirauté, 1701*". No such register has been located. However, April 8, 1701 was a Tuesday, not a Friday. The Quebec court sat on any day except Sunday.

As to whether such a register was in fact prepared is a matter of conjecture. There is a brief note of the seven cases, but only three of them actually raise maritime issues. In one case, between Jacques Guyon Dufresnay and Jacques Cochu, the possession of a boat is disputed. In a second, involving Nicolas Rageot, the tribunal orders that he load his cargo on a vessel and pay the freight. In the third, opposing Pierre Valot to Olivier Guimot and Michel Bouchard, the defendants are ordered to pay to Valot the value of a boat lost while in their possession. The other four cases may have had a maritime flavour, but concern bequests to widows and, in one case, the possession of a herd of cattle. It can be concluded that the Prévôté handled maritime cases and possibly that they were grouped together to be heard on designated days, such as April 8, 1701, but that the admiralty jurisdiction was not seen to be so specialized as to exclude other Prévôté subject matters from being heard at the same sitting.

A second document[661] contains admiralty decisions dating from February 7 to December 6, 1702. The decisions are contained in two small booklets, the first[662] consisting of four sheets of paper 8½ × 11 inches in size bound by string and the second[663] consisting of one sheet of paper of 11 × 17 inches, folded in half. There is a note written in red on the top left corner of the first page of the first booklet, indicating the date of Saturday, February 7, 1702 followed by the words "*registre de l'amirauté*" but the words "*de l'amirauté*" have been struck out and replaced by "*de la Prévosté*", The date of the note is not indicated. The fact that Prévôté is written Prévosté is not an indication of its date, as the latter writing was used at the time the record was made, but has since often been used interchangeably with the more modern spelling. The note indicates some confusion as to whether a register of admiralty or maritime entries existed at the time.

661 BAnQ reference TL5, D318.
662 BAnQ reference TL5, D318A.
663 BAnQ reference TL5, D318B.

There are 11 entries in the booklets, the first of which, dated February 7, 1702, records the swearing in of Georges Regnard Duplessis as clerk and treasurer of the marine in New France under a commission issued by the Admiral of France. The other ten entries concern seven maritime matters, including a dispute over the loss of an anchor due to the manoeuvres of another vessel[664], a dispute concerning a collision[665], a bill of lading short landing claim[666], two prize matters[667], and two suits concerning the ship *La Terible*[668].

A third document[669] contains more than 100 entries of cases decided between January 29 and May 22, 1703. The entries are in a booklet of 44 sheets of paper 8½ × 14 paginated 1-88. The booklet is referred to in the records of the BAnQ as containing *ordonnances de l'amirauté de Québec*. However, on the top left corner of page 1 of the booklet is indicated in red ink "*1703 – Registre des insinuations – Prévosté*". A review of the decisions reveals that this booklet was not in any way related to maritime matters, but rather concerns a variety of issues of a civil and criminal nature. The only connection to the admiralty is that many entries commence with the words *Ordonnance du lieutenant general civil et criminal de la prévosté et amirauté de Québec*. This title implies that the lieutenant was a judge of admiralty and prévôté matters. It does not indicate that there was a separate admiralty judge in Quebec at the beginning of the eighteenth century or that distinct admiralty sessions were held.

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664 The decision obliges the defendant, Jean Briart, master of *La Canadienne*, to recover the anchor and cable or to pay its value to the plaintiff, Jean Chauvet, master of the *Henry*.

665 The plaintiff, Jean Cognet, claims that his boat was damaged and part of an anchor cable lost. The defendant does not appear and a decision in favour of the plaintiff is rendered by default.

666 Antoine de Lagarde, merchant, alleges that three barrels of red wine were short landed by Jean Paradis, master of the *Phelipeaux*. Judgment is rendered in favour of the plaintiff.

667 In the first, the applicants, Jacques Jaunet, master of the *Lion* and Charles le Monarque Samson, master of *La Bonne*, allege having been captured by the English while fishing at l'Île Pierre and that their ships were taken, leaving the plaintiffs and their beleaguered crew in three boats. Having returned safely, the plaintiffs apply to have the boats sold to pay salaries. The tribunal orders the sale to take place by auction and that the balance of the proceeds of sale is to be returned to the owners of the ships taken as prize by the English. The second decision orders the sale by auction of the English ship *Elizabeth*, taken by one Chevalier de Gaboret, commander of the French warship *La Loire*.

668 In the first, dated November 12, 1702, concerning a bill of lading, the master of *La Terible*, Louis Coulougne, is ordered to issue the bill even though he contests the capacity of his ship to carry so much cargo. In the second, dated December 6, 1702, Michel Codd, master of the *Amitié*, takes suit against the same defendant Coulougne. The tribunal orders the matter to be heard at La Rochelle as the late season requires *La Terible* to sail immediately. However, the record indicates that Coulougne did not appear before the tribunal but rather contested the claim before the Prévôté.

669 BAnQ reference TL5, D320.

Such a specialized admiralty judge had however, previously been proposed. On May 30, 1699, the king of France signed letters authorizing Paul Dupuy de Lislois[670] to become the first judge of the admiralty in New France and appointed Michel Lepailleur as admiralty registrar.[671] However, the letters of nomination were never presented to the Conseil supérieur, and neither man took the designated position. Mr. Lislois had been appointed one of the lieutenants[672] of the Prévôté in 1695 and continued to occupy that position until 1710. As lieutenant of the Prévôté, admiralty work was at any rate part of his jurisdiction.

The Règlement of 1717,[673] issued by the king of France, refers to the Ordonnance of 1681 as well as to the earlier *Règlement sur les pouvoirs, fonctions, autorités et droits de la charge d'amiral* of November 12, 1669, and to the fact that neither were sufficiently respected in French colonies because there were no exclusive admiralty judges in the colonies, including in North America and the West Indies.[674]

The Règlement of 1717 is divided into five titles or books. The first deals with jurisdiction. Admiralty judges styled *officiers d'amirauté* were to be appointed in each colony with exclusive jurisdiction to hear cases of maritime law.[675] Appointment was to be at pleasure by royal commission, granted upon the recommendation for nomination of the Admiral of France.[676] The officers were to maintain registers as set out in the Ordonnance of 1681.[677]

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670 Which should apparently always be spelled Lisloye. See *La Prévôté de Québec*, *supra*, note 650 at page 83.

671 LAC reference Collection Moreau Saint-Méry, tome VI, folio 193.

672 Lieutenants of the Prévôté had commenced with the appointment of Louis-Théandre Chartier de Lotbinière in 1666. But from 1695 the intendants of New France obtained the permission to appoint a supplementary lieutenant, styled a particular lieutenant, as opposed to the principal lieutenant, thereafter styled a general lieutenant. These titles were in use in France at the time. Mr. Lislois was the first particular lieutenant of the Prévôté and thus shared jurisdiction over admiralty cases with René-Louis Chartier de Lotbinière, the son of the first lieutenant general.

673 Règlement of 1717, *supra*, note 658.

674 Règlement of 1717, recitals.

675 *Ibid*., Titre I, article I. The other titles covered the creation of a receiver of wrecks for the admiralty, the creation of a right of hearing in instance and prize cases and of appeal of admiralty judgments to the Conseil supérieur, the maintenance of a register of clearance to sail, for which, see the text accompanying note 678 below, and the inspection of ships.

676 *Ibid*., Titre I, article II.

677 *Ibid*., Titre I, article XII. See the Ordonnance of 1681, Livre I, Titre IV, articles 5-10. See also the text accompanying note 268 above. The registers of the admiralty courts of France were maintained in a similar manner. In France, admiralty courts were held in the ports with appeals taken to the general seat of the admiralty court, called the Table de Marbre, in the palace of the Parlement de Paris. The name comes from the marble table in the courtroom where the admiralty judges sat. The table was lost in a fire in 1618, but the name

The first book of the Ordonnance of 1681 sets out seven registers that were to be kept by the admiralty registrar. They include a register of hearings, or more accurately, a register of decisions rendered following hearings, a register of decisions rendered on written proceedings, a register of legislation, including orders, edicts, etc., as well as the nomination of officers, a register of clearance to sail[678], a register of reports of marine incidents by masters, a register of proceedings and exhibits filed and a register of mariners and of ships belonging to shipowners in the area. As was the case in the admiralty courts in France, the first of the seven registers, the register of hearings, is the most important as the principal proceedings, parties and decisions were contained in this register. It is these registers that have been reviewed as part of this enquiry.

Title III of the Règlement of 1717 confirms the jurisdiction of the admiralty judge over instance cases and prize cases, but only for instruction with regard to prize, as prize decisions were reserved to the Admiral of France.[679] However, the admiralty judges could order interlocutory execution of prize decisions as long as the Conseil superieur homologated the order.[680]

Under title V of the Règlement of 1717, admiralty officers were to visit all vessels upon their arrival in port[681] and prior to commencing loading outbound cargoes[682]. In each case a report was to be prepared.[683] The victuals of outbound traffic were to be inspected as well, and if ⅔ of the crew disagreed with the sufficiency of the victuals, a full inspection was to be held. False declarations of victuals could give rise to the replenishment thereof as a charge on the ship and

remained in use until the Revolution. Also lost in 1618, were the records of the general admiralty court of France prior to 1559. But the central court in France was in constant conflict with the local admiralty courts in the French ports and never gained the importance of the English High Court of Admiralty. See Henri-François Buffet, *Z[1D]: Amirauté de France* in Michel Antoine, Henri-François Buffet, *et al*., eds., *Guide des recherches dans le fonds judiciaires de l'ancien régime* (Paris: Imprimerie National, 1958), at pages 261 *et seq*. The reference to Z^{1D} refers to the admiralty records of the central court in the Archives nationales. The extant records of the local admiralty courts vary, as described by Buffet. He underlines the meagre jurisdiction and extant records of the central court during the period under review. The Parisian court was never as active as the local admiralty courts, such as the one in Quebec, the most active admiralty court outside of France.

678 *Registre des congés*. Clearance was required for each voyage except for certain geographical areas where clearance was annual. See Règlement of 1717, Titre IV, articles V to VIII. If clearance was not obtained, the cargo imported or exported could be confiscated.

679 Règlement of 1717, Titre III, article II.

680 *Ibid*., Titre III, article III

681 *Ibid*., Titre V, article I.

682 *Ibid*., Titre V, article II.

683 *Ibid*., Titre V, articles I and V.

cargo, and the master and the person preparing the declaration could also be fined.[684] The admiralty officers were remunerated for these services, but there appears to have been some variation of rates and, in 1735, the king issued the *Règlement des droits et salaires des officiers du siège d'amirauté de Québec*[685] to regularize the situation.

In all cases, the Règlement of 1717 provides for an appeal of the decisions of the admiralty judges to the Conseil superieur.[686] However, decisions concerning suits for the payment of merchandise loaded on ships ready to sail to France were enforceable notwithstanding appeal, and shippers refusing to load such merchandise could face personal arrest or *contrainte par corps*.[687]

Pursuant to the Règlement of 1717, on November 20 of that year, Jean-Baptiste Couillard de Lespinay, sometimes written L'Épinay, the king's attorney before the Court of Prévôté et Amirauté since 1703, was appointed as the first admiralty judge or lieutenant general for Quebec and indeed for New France.[688] However, the tribunal did not sit until the summer of 1719, the first hearing being held on Wednesday, August 19 that year.[689] The court would sit in Quebec City for four decades until the arrival of the British in 1759.

The archives of the court are today in the BAnQ in Quebec City. In the annual report of the Quebec archivist for 1920-21, there is a note concerning the records of the Quebec admiralty under the French.[690] The note reproduces verbatim the 1737 report of a commission set up by decision of the Conseil d'état requiring a full description of the records of the Quebec admiralty

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684 *Ibid*., Titre V, article IV.

685 *Édits et Ordonnances*, *supra*, note 251, at page 546.

686 Règlement of 1717, Titre III, article I.

687 *Ibid*., Titre III, article IV. For *contrainte par corps*, see the text accompanying notes 256 and 261 above.

688 Commission de Lieutenant général de l'amirauté de Québec pour le sieur de L'Épinay, *Ordonnances des Intendants et Arrêts portant règlements du Conseil supérieur de Québec* (Quebec : Desbarats, 1806), at page 354. Note that this volume entitled "volume II" is in reality the only volume bearing this title, and the second volume of materials published by Desbarats. Similarly, Fréchette published these and more materials in three volumes bearing distinct titles in the 1850s, the first being the *Édits et Ordonnances*. See *supra*, note 251. Espinay or L'Épinay held the position until his death in March 1735. A local admiralty court was also created for Isle Royale in Louisbourg. See the text accompanying note 651 above.

689 See "Les registres de l'amirauté de Québec" in the *Rapport de l'archiviste de la Province de Québec, 1920-21* 106, at page 109 [hereinafter *Les registres de l'amirauté*].

690 *Ibid.* pages 106 *et seq*.

court.[691] The report reveals the state of the records after the first two decades of the existence of the court.

According to the report of 1737, the Quebec admiralty records followed the requirements of the Ordonnance of 1681.[692] There were, most importantly, four bound volumes of a register of decisions rendered by the court following hearings. The first covered the period from August 19, 1719[693] to October 7, 1722 for a total of 71 folio pages. The second covered the period from October 7, 1722 to December 13, 1724 for a total of 71 folio pages. The third consisted of 45 folio pages covering hearings from the beginning of 1725 to July 29, 1727[694] and the final bound volume covering the period from July 29, 1727 to October 17, 1731 for a total of 98 folio pages, but of which only the first 77 were filled in at the time. The report mentions a certain number of judgments that were entered but not properly signed, but does not reveal the total number of judgments contained in each volume.

The report indicates that the more recent decisions from the sessions beginning on October 17, 1731 through to the elevation of Nicolas-Gaspard Boucault from his position as the king's attorney before the Court of Prévôté et Amirauté to becoming admiralty lieutenant on August 22, 1736, were written on 164 as yet unbound sheets, containing 266 decisions.[695] This indicates that the total folio pages over 17 years of hearings, from August 1719 to August 1736, came to 428 sheets or approximately 25-26 sheets per year, and that the number of judgments from October 1731 to August 1736 was approximately one a week on average. Extrapolating that average to the entire 17 year record would indicate that almost 900 decisions would have been handed down following hearings.

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691 The arrêt of the Conseil d'état dated May 18, 1737, appointed the then attorney-general and member of the Quebec Conseil supérieur, Louis-Guillaume Verrier, to hold the commission and Verrier was assisted by, amongst others, Boucault who had become the admiralty judge on August 22, 1736, following the death of Lespinay. *Ibid*, at page 130 for the letter of Verrier. The original report is at BAnQ reference TL5, D1137. Following the arrival of the British, Verrier remained in Quebec. He had given courses in law from 1733 to the mid-1750s, and has been compared to Blackstone and described as the father of legal education in North America. See Philip Girard, Jim Phillips and R. Blake Brown, *A History of Law in Canada* (Toronto: Osgoode Society Publications, 2018), vol. 1 at page 269.

692 See the text accompanying note 677 above.

693 This was the first public sitting of the court since its creation.

694 The third volume was somewhat more complicated in its coverage that the others. See *Les registres de l'amirauté*, *supra*, note 689, at page 112.

695 The total has been calculated from the full description of judgments in *Les registres de l'amirauté*, *supra*, note 689.

The report indicates that the letter D was found in the margin of most decisions in the third and fourth volumes and on the 164 unbound sheets, confirming service of these decisions on the parties.[696] The decisions contained in the first two volumes were presumably served, but not so indicated in the registers.

These volumes contained the record of hearings and decisions of the court and thus constituted the court's most important register. However, the other registers mentioned in the 1737 report are not without importance.

The second register contained decisions issued without a hearing, on documents alone. The report indicates that there were two volumes in this series, one for civil cases and one for criminal cases. The civil volume contained decisions handed down between 1719 and 1726 entered on 17 pages out of a volume containing 71 pages, with the balance left blank. The criminal volume contained decisions handed down between 1723 and 1726, entered on three pages out of a volume containing 44 pages, with the balance blank. The number of decisions per page is not indicated, but would probably be much higher than in the registers of decisions rendered following hearings, as the latter contained a full description of the objections and arguments of the parties made in open court.

The third register contained the enrollment of official orders, nominations, edicts, decrees, commissions, appointments of pilots, etc. The volume covered the period from 1719 to 1737 and notations were registered on the first 17 pages out of 44.

The fourth register contained the enrollment of *congés* or of permission granted to masters allowing them to leave the port. A similar obligation required masters to make a report upon arriving in a port. The control of merchandise entering and leaving a port was a major preoccupation throughout the colonial period. The register consisted of five volumes covering the period from 1719 to 1737. The first four, of varying thickness, contained a total of 291 pages plus 28 unbound sheets in a booklet inserted in the fourth volume. In the fifth volume, 55 pages out of 86 had been filled in.

696 *Les registres de l'amirauté*, *supra*, note 689, at page 125.

The fifth register contained the listing of prize and wrecked ships found at sea. The register consisted of five volumes covering the period from 1719 to 1737. The first four volumes varied in thickness but contained 326 pages which were filled in, as were 66 pages out of 124 in the fifth volume. Navigation in New France was a risky business.

The sixth register contained a list of all documents filed or deposited in the admiralty registry. The register consisted of one volume containing 47 pages, only the first two of which were required to cover the period 1720 to 1736.[697]

The seventh and final register required by the Ordonnance of 1681 was to include the roll of masters, mates, fishermen and mariners as well as the listing of vessels belonging to local shipowners, but the report confirms that no such register was maintained in Quebec in 1737.

The 1737 report to the French government contains a full description of the six registers with various portions of the report signed by attorney-general Verrier but also by the admiralty judge, Boucault and by the substitute attorney-general Hiché. In a covering letter to the government dated October 12, 1737, Verrier confirms that the most important register is the first, containing the decisions of the court following hearings. He specifically points out that the letter D in the margin of volumes three and four and on the unbound sheets following volume four, indicates that the decisions had been served on the parties. The other registers are mentioned, but only to point out that the seventh register required by the Ordonnance of 1681 was not maintained in Quebec.

This report is of importance as the registers it refers to, including 18 bound volumes and many unbound sheets, are not in the BAnQ and have not been found. In 1789 Lord Dorchester appointed a committee to review records from the French regime and on August 4, 1789 the committee reported having viewed a "large case of damaged documents" containing the registers

[697] There exists in the BAnQ as document TL5, D2005 a register entitled both *Production de pièces au Conseil supérieur* and *Production de pièces par l'amirauté* on the front page and, on the back cover, in a more recent hand, *Registre des productions de la Cour d'amirauté*. It begins on September 2, 1721 and ends on September 21, 1740. The register is in the form of a booklet of 22 bound sheets. Only the first 18 are filled in. Entries refer to proceedings, letters or the proceeds of sale deposited with the registry. The first two sheets or four pages cover September 1721 through March 1729, but entries for 1737 only first appear on the verso side of the seventh sheet or the 13th page, making it possible, but unlikely, that only the first two pages would have been filled in in 1737, and that this would be the sixth register seen that year.

of the French admiralty court in Quebec. The contents were in such poor state that they could not be lifted out of the case except for one volume covering the period immediately prior to the conquest. As will be seen, that volume, two others and some unbound sheets collectively covering the period from 1740 to 1760, have survived, and are in the BAnQ archives. But the other volumes and sheets have not.

The Quebec archivist's note introducing the 1737 report states that the admiralty records were taken to France following the conquest.[698] But these records have not been located and it seems doubtful that the records prior to 1740 would have been taken but not those more readily at hand covering the period between 1740 and 1759. Further, if they were removed, what was found in 1789 in the case of admiralty registers so damaged as to not be readable? It would appear that the registers may in fact have been damaged beyond repair and thus lost. The archivist reports that two registers remain in the Quebec archives, one for 1741 and one for 1749-56.

The report of 1737 mentions that, from 1731 to 1736, the register of hearings consisted of a series of 164 unbound folio sheets containing 266 decisions. It is not clear whether these sheets were filled in and ready to be bound, but this would appear unlikely, due to the large number of 107 sheets out of 164 that contained exactly one decision. The existing bound registers contain a continuous entry of decisions and many, certainly the majority, are not contained on any one folio sheet. Rather, in a book style, the entries continue from one sheet to the next. It would appear unlikely that the unbound 164 sheets were ready for binding, if it can be assumed that the pre-1731 registers had the same appearance as the post-1737 registers that exist today.

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[698] *Les registres de l'amirauté, supra*, note 689, at page 110. The archivist states that the registers are in the Archives de la Marine in Paris. It has not been possible to confirm this. However, in 1886 and 1887, the reports on the Canadian archives include a report of Mr. Joseph Marmette, assistant archivist, who had been dispatched to Paris to research Canadian historical documents in the Archives de la Marine. He prepared a calendar of the documents found there, including several documents that were labelled extracts from the registers of the admiralty court in Louisbourg, but which may in fact have been the actual unbound registers of that local court. No references refer to registers from the Quebec admiralty court. See "Report on the Archives Coloniales de la Marine" in Douglas Brymner, archivist, *Report on Canadian Archives 1886*, at page xxxi, and *Report on Canadian Archives 1887*, at page cxxxv (Ottawa: Maclean, Roger, 1887-88). See also Buffet, *Z^{1D}: Amirauté de France*, *supra*, note 677 at page 274, where certain archives of the Louisbourg admiralty court are said to be in the Charente-Maritime archives.

That said, the first register pages that exist in the BAnQ collection start in May of 1740.[699] There are two groups of paper folio sheets extant, the first containing four folios marked pages 1-8 and the second eight folios marked 1-16. However, a closer reading indicates that the pages come from a register that was bound at some point. At the top of the recto side of the first folio in the first group is written *vingt-deuxième feuillet* and the references progress on each sheet, ending on the recto side of the last folio of the second group with the annotation *trente-troisième feuillet*. This indicates not only that the folios were in succession to one another, but that they were at some point bound together.

The number of pages in the original register is unclear, but there were certainly more than 33 folio pages. The first entry is incomplete, having started on what would have been the 21st folio and the parties are not identified. The next entry is dated May 11, 1740 and the last, on the verso side of the last sheet is dated November 5, 1740 and is incomplete as it would have continued on what would have been the 34th folio. In all, there are 32 entries over the period of six months. The contents of these sheets has been transcribed in the register table accompanying this enquiry, as have the contents of the three existing bound registers of admiralty decisions following hearings.

The first bound register of hearings commences on July 1, 1741 and ends on September 28, 1742.[700] The register contains 118 entries on 44 paper folio sheets of approximately 10 × 15 inches in size. The register is bound in leather with the word *Amirauté* printed on the upper spine and 1741 on the lower spine. The volume commences with A-Z index pages, which are neither filled in nor part of the 44 sheets referred to. There is no title page, but the first of the 44 pages contains a note to the effect that the register contains forty-five [*sic*] sheets initialled by Nicolas-Gaspard Boucault, the lieutenant of the admiralty at the time, and the upper right corner of the recto of each sheet is so initialled. The initials appear as "Bte" but that this is Baucault's initials can be ascertained from two entries in the register which are signed by Boucault in this manner.[701]

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699 The sheets from the 1740 register of hearings are found at BAnQ references TL5, D4229-39 and D4229-40.

700 BAnQ reference TP2, S11, SS1.

701 See the entry of August 8, 1742 at folio 33v and that of August 22, 1742 at folio 36r. All other entries are signed in full by Boucault.

Each folio is also marked *x^ième^ feuillet* on the top left side of the folio and a separate Arabic numbering on the right, but there is an error in that from the 10th folio the page entry on the left is marked *11^ième^ feuillet* and the Arabic entry is marked 10. Thus the final, forty-fourth folio is marked *45^ième^ feuillet* on the left and 44 on the right. It is this slippage that results in the mention at the beginning that there are 45 folios. The numbering and initialling was done prior to using the register, as the registers not completely filled in are initialed and paginated to the end. Several numbering references have been trimmed off in the binding process.

There is in BAnQ a typed transcription of the first register which is also bound in leather. It appears to have been prepared by an unnamed source during the mid-twentieth century. The volume contains 138 foolscap pages, typed on the recto side only in blue ink and reproduces the manuscript 1741-42 register verbatim.

The second bound register of hearings has no title page although it has A-Z index pages which are properly filled in with the names of the parties.[702] The register commences with four entries of an unspecified date in 1749 and ends on May 29, 1756. Following the first four entries, the dates commence on September 25, 1749. The register is divided in three portions. The first portion of the register includes 44 numbered paper folios ending with an incomplete entry dated June 16, 1752, followed by four entries between that date and October 18, 1753.[703]

The second portion of the register contains a note, on page 45, indicating that that page is the first page of a register containing 95 pages, each initialed by Guillaume Guillemin, admiralty lieutenant since June of 1750.[704] Folios 2-5 of this new portion are missing but the sixth folio, also numbered 46, continues with a case dated October 19, 1753. The second portion of the register ends on the verso side of numbered folio 134 marked *quatre-vingt-quatorze* [*sic*] without including the decision taken in the last case dated October 23, 1754.[705]

The third portion of the second bound register starts on folio 135 which contains a note indicating that it is the first page of a register containing 71 pages. This portion includes entries

[702] BAnQ reference TP2, S11, SS1.

[703] Two of the four cases were appealed to the Conseil supérieur and, from the final decisions dated October 22 and 27, 1753, it can be seen that the date of the decisions under appeal was October 18, 1753. The speed with which appeals were heard is impressive.

[704] Guillemin is sometimes spelt Guillimin and his signature can support either interpretation.

[705] But the Dispositif register described below provides the final decision in the case.

dated from October 26, 1754 through May 29, 1756 and concludes on page 201, but a final page 202 has been identified as part of the research done for this enquiry in the BAnQ.[706]

Thus the second register is in reality three registers bound together in leather binding but without a spine as the binding is disintegrating. The register contains 263 entries on folios approximately 9½ × 14½ inches in size. Each folio is initialed, the first portion by François Daine and the rest by Guillaume Guillemin. Each entry is signed by one or the other. It is noteworthy that the first portion, covering 1749 to 1752, contains a high percentage of non-marine cases, including estate matters and real estate disputes.

François Daine had been the lieutenant of the Prévôté since 1744 and it is probable that many entries in the first portion of the second register are Prévôté cases. Daine sat in for the admiralty lieutenant Nicolas-Gaspard Boucault, who had left for France in the fall of 1747, requesting a leave of absence of two years.[707] He would never return, and Daine combined both positions until the appointment of Guillaume Guillemin as lieutenant of the admiralty on June 2, 1750. It is likely that several sittings of the court presided by Daine heard both Prévôté and admiralty cases, and although registers should have been kept separately, it is possible that some admiralty register entries were intended to comprise, or be included in, a volume of Prévôté cases.[708]

The third and final bound register of hearings commences on June 10, 1758 and ends on March 3, 1760. The register consists of 61 entries on the first 23 of 198 paper folios of approximately 10 × 17½ inches. Each folio is initialed by Guillemin. The initial page contains a note reading: "*Le présent registre contenant cent quatre-vingt-dix-huit feuillets, celuy-cy compris, a été paraphé, par premier et dernier feuillet, par nous, Guillaume Guillemin, conseiller du Roy, Lieutenant particulier de la Prévosté et Lieutenant général Civil et Criminel de l'amirauté de cette ville,*

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706 Page 202 of the second register was found in BAnQ box 1 B 014 01-05-001B-01, BAnQ reference TP2, S11, SS2, of which more below. It should also be noted that due to a binding error, folios numbered 161-165 are bound following folio 170.

707 See "État présent du Canada par Nicolas-Gaspard Boucault" in the *Rapport de l'archiviste de la Province de Québec, 1920-21* 1, at page 4, citing the earlier *Rapport de l'archiviste de la Province de Québec, 1905*, at page 96.

708 The cases heard by Daine in the admiralty register cover the years 1749-52. Prévôté cases for these years exist and are found in volumes 93, 98 and 99 of the civil registers referred to in *La Prévôté de Québec*, *supra*, note 650 at page 145. The original Prévôté registers are at BAnQ reference TL1, S11, SS1. Conversely, in volume 99 of the Prévôté registers, a note indicates that the admiralty judge Guillemin presided over the first few sittings of the Prévôté court, due to the absence of Daine.

pour servir à l'enregistrement des causes d'audience de ladite amirauté, fait à Québec le huit juin mil sept cent cinquante-huit."[709]

The register in fact does not contain 198 folios as the 82nd folio is marked *cent trente-neuf* and the final page, marked *cent quatre-vingt-dix-huit et dernière feuille* also bears the number 141 in a later hand. Either some 50 pages are missing, or the binder made a mistake in numbering. At any rate, only the first 23 folios are filled in, the others remaining blank. Guillemin signs each entry up to August 18, 1759 on folio 21 recto, but the final entries are not signed. The spine is marked Registre de la Prévosté de Québec 17 juin 1758 – 3 mars 1762. The latter date probably results from the last entry in the register which reads: "*L'audience des criées par extraordinaire le lundy treize mars mil sept cent soixante deux heures de relevée*". The absence of a comma between the date and the time would explain the error in the year, if not in the day.

These three bound volumes and the unbound 12 folio pages from the 1740 volume contain a total of 474 entries and constitute the only registers of admiralty hearings that remain in the BAnQ. For the purposes of the present enquiry, these records constitute the basis of the review of procedural methods applied in Quebec under the French regime, and have been transcribed in a tabular form as part of the accompanying materials. It is possible that some of the earlier volumes described in the 1737 report were taken to France, but they have yet to be located. There are however three other documents in the BAnQ that concern the admiralty jurisdiction of the French regime courts.

The first is one folio page of approximately 15 × 20 inches, folded to make four 15 × 10 inch pages containing four entries each dated October 10, 1746 and initialed by Boucault.[710] The entries concern four different disputes involving cargo claims. There is no register extant for this year. There exists a decision rendered on January 9, 1747 by the Conseil supérieur dismissing an appeal from a decision of the admiralty lieutenant dated December 10, 1746[711] relating to the first of the four cases, but the reason why these four October entries appear together is not clear. It is assumed that this may have been a draft copy of the decision to be entered in the register of

[709] This note is mentioned in the report of the committee struck by Lord Dorchester in 1789 to review the French admiralty holdings, as introducing the sole volume that was not found to be damaged. See the report in *Les registres de l'amirauté*, *supra*, note 689 at page 111.

[710] The sheet is found at BAnQ reference TL5, D4229-43.

[711] See volume 62 of the Consel supérieur registers at folio 126, BAnQ reference TP1, S28, P20018.

hearings but, without the register, one cannot be certain. The decisions may have been made on documents without a hearing, and this may also have been a draft to be entered in the register of cases decided without hearings.

The second document of interest is in the form of a small booklet sewn together. The booklet is called a *Dispositif* which is the term used to describe the conclusions of a judgment[712]. On the cover of the booklet is written "*Disposif pour les cause d'audition de l'amirauté commencé le samedy vingt-huit septembre 1754*" and, in another hand, has been added "*au 9 décembre 1755*". These are the dates covered. There are 93 entries including 90 entries of decisions in cases and three reports of service of process which would not usually appear in the register[713]. Two additional entries dated October 26 and October 29, 1754 have been entirely struck out.

Of the 90 entries, 39 are not found in the existing register for 1749-56 but the other 51 are. These entries are virtually identical, but the Dispositif copy is clearly a draft, as some of the entries are slightly shorter than the final entry in the register. The majority of entries in the Dispositif copy, 64 in total, are however signed by Boucault. Of these 64, there are 26 bearing signatures, but which are not in the register of decisions following hearings. The fact that they are signed would lead to the conclusion that they were meant to be formal decisions, and it is possible that the 26 signed entries that are not found in the register, and perhaps the 13 other unsigned entries that are not found in the register, were intended to be entered in the register of decisions taken without hearings, but that cannot be verified. Clearly, the Dispositif was a draft booklet or register of decisions that were to be entered in some register.

The third document or set of documents is gathered in a box[714] containing different admiralty documents and pleadings. There are four file folders in the box. The first folder concerns the finding of a whale at les Éboulements in Quebec and a dispute as to whether it is a royal fish under Title VII of Book V of the Ordonnance of 1681. The folder contains what appears to be extracts from the register of hearings[715] dated July 13, 1735 and September 10, 1735, both

712 The booklet is found at BAnQ reference TL5, D2010-1.
713 The reports of service appear at page 106 in the form of a loose leaf and separately from the booklet in BAnQ documents TL5, D2010-2 and D2010-3.
714 The box is numbered 1 B 014 01-05-001B-01, BAnQ reference TP2, S11, SS2.
715 The original of which may never have been bound. See the text accompanying note 695 above.

following the death of Lespinay.[716] Documents in the folder cover the period from November 30, 1734 through to September 26, 1735 when the Conseil supérieur dismisses the appeal.[717] The folder contains the pleadings before the Conseil supérieur in which the parties cite article 2 of Title VII of Book V of the Ordonnance of 1681.

The second folder contains general admiralty miscellany from 1687 to 1735. There are 11 documents or gatherings of documents, including motions made concerning the *Catherine*, grounded in Tadoussac in the fall of 1686, and claims for prize following the taking of the British ship *Pembroke* in 1704 and the admiral's claim to a portion of the proceeds. There are two extracts from the register of hearings. The first is dated May 6, 1722 and the second July 21, 1735. Both commence by making reference to the Admiral of France[718] and are signed by Pierre André de Leigne, lieutenant general of the Prévôté sitting in the first case during the absence of the admiralty judge, Lespinay, and the second following the death of Lespinay. The first concerns the sale of the barque *St-Jean* and the second the seizure of a cargo of whale oil and whale bone.

The third folder contains admiralty miscellany from 1736 to 1755. There are 27 documents or gatherings of documents including eight extracts from the register of decisions following hearings, each issued in the name of the Admiral of France. The extracts concern various matters, some of which appear more related to prévôté matters than to admiralty matters.[719] Three 1738 extracts concern the ship *Lorry* and a dispute over a cargo of 120 barrels of *eau de vie*. The case does not appear to have been appealed to the Conseil supérieur.

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716 Lespinay died on March 8, 1735. The extract of the register for July 1735, although greatly damaged, confirms that Pierre André de Leigne, lieutenant general of the Prévôté, was sitting as admiralty judge due to the decease of Lespinay.

717 The appeal is recorded in the register of Conseil supérieur, volume 44, folio 21, BAnQ reference TP1, S28, P18228.

718 The date of preparation of the extracts is not indicated, but reference in both is to Louis-Alexandre de Bourbon, compte de Toulouse. Louis-Alexander was succeeded as Admiral of France by his son, Louis-Jean-Marie de Bourbon, duc de Penthièvre in 1737. Louis-Jean-Marie was the last Admiral of France to be appointed. The registers from which the extracts are taken did not include the formality of referring to the Admiral of France. The text extracted appears otherwise to reproduce the style of an entry in the register.

719 For example, in an extract dated October 16, 1745, the admiralty judge orders that two locked chambers be opened in a dispute between a merchant and a fur trader. In another, dated June 19, 1747, the prévôté judge orders the opening of a trunk belonging to the wife of a prisoner wherein are found various items of clothing. It is impossible, without more, to determine whether these extracts are of a maritime nature and the replacement of one judge by the other is not conclusive as to the subject matter, as they replaced one another in times of absence or illness.

One gathering of documents concerns the vessel *London* which would appear to be a British ship originally called *Prince Edward* taken by the French and renamed *Cerf* at La Rochelle before coming to Quebec. The vessel is at some point renamed the *London*, but not before being grounded at Île Verte in the River St. Lawrence. The sale of the ship's furniture and cargo on board brings in 2,458 French pounds, but court costs attain almost 1,000 pounds leaving 1,590 to be distributed amongst claimants.

Another extract dated May 10, 1752 concerns a dispute between Charles Turpin and Pierre Revol, two Quebec merchants. The entry does not appear in the existing register for 1749 -1756 but may have been decided without a hearing. The two merchants appear again in the registers of the Conseil supérieur on September 13, 1751, probably in the same or a closely related matter.[720]

The fourth folder contains admiralty miscellany from 1756-59. There are 17 documents or gatherings of documents including six extracts from the admiralty register of decisions following hearings. Four of the extracts correspond to entries in the existing register of hearings for 1758 to 1760. These concern two related fisheries disputes involving members of the Arbou or Harbour family. The fishing licence was for Cap-Chat and in one case a partner[721] of Joseph Arbou claims his portion of profits. In the other, Jean Arbou claims his share of the proceeds of the catch from Joseph Arbou. The importance of these six extracts is that they allow a comparison of what was actually entered on the register and, with the exception of the introductory inscription referring to the Admiral of France, it can be seen that the extracts are exact copies of the entries themselves. The extracts are annotated with proof of service by a bailiff. Other documents in the folder concern these cases and contain various recognitions of the sale of items to satisfy the claims against Joseph Arbou.

The above documents are the only known collections of admiralty materials for the French period. However, they are by no means the only admiralty materials in the BAnQ collection. There are two additional sources of admiralty matters.

[720] Conseil supérieur register 65, folio 45, BAnQ reference TP1, S28, P20647.
[721] The partner is Jacques Bellecour de la Fontaine, a counsellor with the Conseil supérieur.

First, the BAnQ collection includes multiple fragments of admiralty proceedings[722], especially for appeals to the Conseil supérieur from decisions of the admiralty lieutenants. There are also multiple affidavits of service made by bailiffs in Quebec City. However, neither the Conseil supérieur nor the admiralty court appears to have had the practice of conserving pleadings and even the register of documents filed with the registry[723] only contains a few pages of entries. It would appear that, true to the Ordonnance of 1681, the admiralty courts only kept registers. However, the fragments of pleadings and the affidavits of service are of interest in seeing how files were prepared and presented.

Finally, the BAnQ collection includes the registers of decisions of both the Conseil supérieur and the Prévôté. The registers of decisions of the Conseil supérieur run to 69 volumes covering the entire life of the court from 1663 to 1760.[724] The Conseil heard appeals from the Prévôté and, shipping being such a lifeline to the colony, it is not surprising that many decisions concerned matters related to maritime law which would, after 1717, be of the jurisdiction of the admiralty court. The registers of the Conseil supérieur start referring to decisions appealed from the lieutenants of the *Prévosté et Amirauté* from 1691.[725]

The registers of civil and criminal decisions of the Prévôté include 109 volumes covering the period from 1667 to 1759.[726] Although only a local court, in the sense that other prévôté courts were created in Trois-Rivières and Montreal, all admiralty matters that were decided prior to the creation of the admiralty court in 1717 appear to have been handled in Quebec City. The reference to the *Prévosté et Amirauté* appears to have been in use from time to time when civil or

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722 The series TL5, D is the largest collection of fragments of admiralty proceedings and documents involving the Prévôté and Conseil supérieur prior to the creation of the admiralty in 1717, as well as fragments of motions, appeals and proceedings involving the later files of the admiralty and the Conseil supérieur.

723 See the text accompanying note 697 above.

724 BAnQ reference TP1, S28. The Conseil souverain de la Nouvelle France, later called the Conseil supérieur, was created by Louis XIV in April 1663. See the text accompanying note 653 above.

725 One of the first appears to be dated January 29, 1691 in a dispute involving a cargo claim of goods arriving from La Rochelle on board the *Glorieux*. The appeal is from a decision of the Prévôté, but refers to a statement of loss made before the registry of the *Prévosté et Amirauté* on November 18, 1690. See Conseil supérieur register 7, folio 84, BAnQ reference TP1, S28, P3936.

726 BAnQ reference TL1, S11, SS1. The Prévôté of Quebec was only formally created as a royal court by Louis XIV in May, 1677, but a seigneurial court of that name was created by the Compagnie des Indes occidentals in 1666. The court was dismantled by Louis with the revocation of the authority of the Compagnie in December 1674, but the prévôté records confirm that the court continued to hear cases throughout the period. See *La Prévôté de Québec*, *supra*, note 650, at page 56. For the creation of the court in 1677, see *Édits et Ordonnances*, *supra*, note 251, at page 90. A modern researcher, Guy Perron, has transcribed the first 26 registers. See the author's website, "*À la découverte de la Prévôté de Québec*".

criminal maritime matters were considered, but the term is only used in the extant original documentation as from the first years of the eighteenth century as set out above.[727] A formal court of admiralty was not in existence as a separate court before 1717.

The full study of maritime jurisprudence in Quebec under the French would involve a review of these 178 registers. Luckily, the registers of both the Conseil supérieur and the Prévôté are being published and becoming available on line.[728] The sheer volume of documents is such that these publications will take years to complete.

The Records of the Quebec Vice-Admiralty Court

Following the arrival of the British in Quebec in September 1759, and until the Treaty of Paris, signed in February 1763, all questions of law were submitted to the military courts of James Murray created in October 1760.[729] A Quebec Vice-Admiralty Court was proposed at the end of 1763, but would not be created until August 24, 1764 when Murray issued a commission to James Potts to act as the first admiralty judge under the new British regime.[730]

It is with this commission to James Potts that commence the registers of the Quebec Vice-Admiralty Court. The registers were kept in somewhat of a hybrid nature when compared to the complex registers kept by the High Court of Admiralty, being a simple continuous chronological series of minutes of business before the Vice-Admiralty Court. That the registers were copied from notes taken in open court by the registrar is beyond doubt. Some of the entries in the fair registers also exist in unbound rough notes, obviously scribbled in open court, and the rough register of 1808-11 contains material recorded in a booklet in open court, much of which was copied in the fair registers. However, the entries from June 1810 through October 1811 only exist in this rough register, as no fair register has been found for these years.

Thus, the register for any date could include developments in any number of cases before the court that day, but even the fair copy is not formally drawn. Rather, in the earlier registers, the

727 See the text accompanying notes 660 and 661 above.

728 Mr. Guy Perron is publishing the registers of the Prévôté, of which the first 26 civil registers covering 1666 to 1689 are now in print. The registers of the Conseil supérieur have been published for the years 1663 to 1713.

729 For the text of the *Ordinance establishing Military Courts* see Shortt and Doughty, *supra*, note 443, at page 42.

730 In December1763 the former admiralty judge of the Court of Admiralty of Ireland, Hugh Baillie, was appointed to become the first admiralty judge in Quebec. See *supra*, note 480.

words "Court of Vice-Admiralty" and the date of the entry are written on the upper right-hand corner of the page with the name of the judge below, usually Justice Kerr, and the style of each case heard that day is written on the left side of the page where consideration of the case begins, with a curly bracket in the centre of the page to the right of which appears the notation that the court was opened by the usual proclamation. In later volumes, the title of the court is not repeated for each entry but the words "the same" are used to designate the court, date and judge for each subsequent entry on any particular date.

Registers are written on paper and, with the exception of the first register of 132 pages, covering the years 1764 to 1775, were not bound, but were sewn into small booklets of 25 to 50 pages each. There are twelve manuscript registers extant running from September 1764 to February 1819, but with gaps for the years 1776 to 1803, 1806 and 1807. From 1820 to 1838, there is a further gap and in 1839 registers re-emerge, but this time in the form of the second volume of an Action Book, similar to volume 80 of the English Warrant Book series, being the Action Book of the High Court of Admiralty for 1858-59.

This is not to say that manuscript registers did not continue to be prepared from 1820 onwards. There are many references to entries made in the registers throughout the files and, where a decision of the vice-admiralty judge is appealed, the registrar's fees for the preparation of a transcription of the register entries for the case under appeal invariably appear in the bill of costs. In a few cases, the extract transcriptions are found, but the actual registers following that of 1819 have yet to be located.

Action Books were created for vice-admiralty courts by rule 7 of the 1832 Rules, issued on June 27, 1832, pursuant to the 1832 Act passed by Parliament that year.[731] As previously noted, the first Action Book of warrants issued by the Quebec court for 1832-39 has yet to be found. However, that proctors made their own entries in the Action Books can be clearly seen from both the second volume covering 1839-42 and the third and final extant Action Book covering 1843-48.

[731] The long titles of the rules and of the Act were *Rules and Regulations to be observed in the several Courts of Vice Admiralty* and *An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad, and to obviate Doubts as to their Jurisdiction*, 1832 (U.K.), 2 Will. IV, c. 51. See the text accompanying note 494 above.

The 1832 Act was intended to align the records of all British vice-admiralty courts. Rule 5 of the 1832 Rules obliged the registrar to maintain an "Assignation Book" of the minutes of every act or decree and to record all pleas and documents received by the court. The registers maintained prior to 1832 were not referred to as Assignation Books, and to what extent such instruments were created and maintained in Quebec is unknown, as the only records in existence following the adoption of the 1832 Rules are two volumes of Action Books.

With regard to the Quebec Vice-Admiralty Court, the 1832 Act coincides with the commencement of the reporting of cases decided by the court. Mr. George Okill Stuart commenced reporting "a few of the more important cases" of the court in 1834. The volume of King's Bench reports published by Mr. Stuart that year contains four decisions of James Kerr, judge of the vice-admiralty court since 1797. However, only one, *The Coldstream*,[732] a case decided in July 1832, is contemporaneous with the reports. Considering Mr. Stuart was only admitted to practice in 1830, his source for the earlier cases would likely have been reports in the local newspapers.[733]

In 1858, Mr. Stuart published the first of two volumes of cases decided by the Quebec Vice-Admiralty Court, commencing with cases decided by Henry Black, who became judge on September 21, 1836.[734] In the preface to volume 1 of his reports of the Vice-Admiralty Court, Mr. Stuart states that prior to the 1832 Act, the records of the Court "afford little information as to the extent and the nature of cases brought before it …" It is to those earlier records that this note of introduction must now turn.

The records of the Vice-Admiralty Court in the old Province of Quebec and in Lower Canada prior to 1832 include the above-mentioned series of twelve registers containing entries of all

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732 *The Coldstream*, QVA 750-32, Stu. K.B. 518 (1832 QCVA). For more on *The Coldstream*, see the text accompanying note 938 below. The three other cases are *The Harrower*, QVA 131-16, Stu. K.B. 80 (1816 QCVA), *The Camillus*, QVA 303-23, Stu. K.B. 158 (1823 QCVA) and *The William of Dublin*, QVA 319-23, Stu. K.B. 163 (1823 QCVA).

733 Although Stuart had other sources. His uncle was James Stuart, the Attorney-General, and his wife's uncle was Henry Black, a prominent admiralty advocate and later vice-admiralty judge.

734 George Okill Stuart, *Cases in the Vice-Admiralty Court for Lower Canada* (London: Stevens, 1858 and 1875). Black had been appointed to the position following the rather unceremonious dismissal of Kerr on September 24, 1834. Kerr had been involved in several disputes over fees and had made a life-long enemy in Conrad Augustus Gugy, one of the admiralty proctors. See *infra*, notes 737 and 1056. Gugy filed a petition in the Quebec House of Assembly alleging 51 offences by Kerr, eventually contributing to the dismissal.

business transacted by the Court. The first register, covering the years 1764 to 1775 in a fair hand, is in the possession of the BAnQ in Quebec City. It begins with the commission to James Potts although the copy of the commission has been cut in such a manner as to render the commission illegible without reference to the more complete copy in the possession of LAC.[735] The form and style of entries vary, and illustrate that the summary of recorded entries was yet to be standardized.

The other eleven registers cover the following dates:

- August 1804 – November 1805.
- September 1808 – July 1809.
- August 1809 – May 1810.
- October 1809 – August 1810 (*The Beaver*, QVA 29-09).
- September 1808 – October 1811 (rough).
- June 1811 – April 1812.
- June 1813 – August 1813.
- June 1813 – May 1814.
- May 1814 – January 1815.
- January 1815 – November 1816.
- March 1817 – February 1819.

For many years, the whereabouts of these registers was not widely known, but they were in fact contained in the boxes of files of the Quebec Vice-Admiralty Court held by the Federal Court in its archives. The files run from 1780 to 1844 and then again from 1873 until the Vice-Admiralty Courts were overtaken by the Exchequer Court of Canada under the *Colonial Courts of Admiralty Act, 1890*. The gap is doubtlessly due to a fire destroying the Quebec court house in February 1873. Luckily, the earlier records were stored remotely at the time.

All registers, with the exception of the first, concern the period during which James Kerr was judge. Kerr was appointed judge in August 1797 and remained in this position until September 1834, although, having been in England during a few of the intervening years, he did not act as

[735] The register for 1764-75 is at BAnQ TP4, S1. The complete commission to James Potts is at LAC reference RG68, volume 89, file 1, Commissions and Letters Patent, at pages 6-7.

judge in all of the cases recorded in the registers. When he was not sitting as judge, one of the advocates replaced him as a surrogate judge.

Unlike the practice of the High Court of Admiralty, whereby pleadings were separated into different categories and kept with similar pleadings from other cases, the pleadings of the Quebec Vice-Admiralty Court were bundled together on a more modern file-by-file basis, with each bundle containing all pleadings in the case, written on foolscap paper folded twice and tied together with pink ribbon. Bundles range in size from one or two sheets to hundreds of sheets. The files include not only pleadings of the parties but interrogatories, answers to interrogatories, commission evidence, affidavit evidence, decrees or judgments and reasons therefor.

During the second half of the twentieth century, a clerk of the Exchequer or Federal Court re-boxed the files of the Quebec Vice-Admiralty Court. The clerk did not untie the individual file bundles, but stamped with a mechanical stamp on the backsheet of the outermost pleading of each bundle, a number starting with number 1 in the year 1780. No file bundles earlier than 1780 have been found. The name of the parties appears on the backsheet of each pleading and thus, without untying the bundles, the clerk was able to identify the file from the outermost pleading in the bundle and stamp the number.[736] Untying the files revealed however that pleadings were in many cases jumbled between files and had to be re-sorted, confirming that they had not been read during the numbering process. It would appear unlikely that the bundles had ever been untied since the pleadings were filed before the court.

The stamped numbers were roughly chronological, although only to the extent the files were packed in their former boxes in chronological order. Corresponding numbers were hand-written in blue ink in the margin of the fair registers of the court next to each entry recorded. Where no file was found by the clerk for an entry in the register, the words "*pas dossier*" are written in the margin of the register, indicating that the clerk was probably a francophone. However, only a fraction of *pas dossier* inscriptions concern files that have not been identified as part of the present enquiry.

[736] A set of index cards containing the names of the parties involved in each file was created, possibly by the same clerk, presumably without untying the bundled pleadings. The card index was later filed in the BAnQ but has since been destroyed.

The files are stamped from number 1 in the year 1780 to number 1265 in the year 1838 and, as indicated above, the file numbers are hand-written in the corresponding registers. Thereafter, numbers continue to be stamped on the files and are stamped as well next to the entry for the file in the second volume of the Action Books for numbers 1266 in the year 1839 to number 1648 in the year 1841. These files were numbered in the order they were entered in the second Action Book, and are therefore in precise chronological order.

Stamped file numbers stop both on the bundles and in the second Action Book as of the beginning of 1842 for an unknown reason, considering that file bundles exist until the beginning of the year 1844. It is also unknown whether the clerk had volume 1 of the Action Books at his disposal, and whether numbers were stamped in the margin of that book but presumably, if he had, he would have arranged and number stamped the file bundles in the order of their entry in the first Action Book as he did for the second volume. This was not done, indicating that the first volume was probably not available. Research has been carried out to find the first Action Book volume but has been unsuccessful to date.

No file numbers appear in the third Action Book. However, the Action Books contain their own numbering scheme with each entry numbered as from the number 1 for each year. Action Book numbers are hand-written in the margin next to each entry and appear to be contemporaneous to the entries themselves. A similar number was hand-written on the backsheet of one pleading in each bundle. These numbers are not necessarily on the outermost pleading and were likely assigned contemporaneously with the proceedings.

Action Book numbers allow us to re-construct the chronology of the commencement of each file in the first volume of the Action Books even in absence of the volume itself. Action Book numbering for the missing first volume commences with the 17th entry for 1832, written on file QVA 739-32, a claim in damages for assault made by a passenger, William Rome, against George Smith, master of the vessel *Waterloo*, and ends with the 36th entry for 1836 written on file QVA 1252-38, a wage claim by two mariners, Alexander Moodie and John Hawswell, against the vessel *Europe*. However, other files from the period covered by the first Action Book do not have Action Book numbers written on them.

The Action Book entries being numbered chronologically allows us to confirm that the clerk must not have had access to the first Action Book volume or he would have number stamped the files in their proper order. The Action Book numbers also allow us to re-organize the order of files from the year 1842 to the year 1844 and the final existing file bundle, file QVA BB[29]-44, concerning a wage claim by William Narrowmore against Henry Davis and Thomas McCaw, owners of the vessel *Welsford*. A review of the Action Books and existing files confirms that all actions commenced in the vice-admiralty court were entered in the Action Books.

From the Action Books can be seen that there are usually not more than a dozen cases commenced each month. However for the years 1841-44 there were respectively 187, 283, 417 and 336 cases entered in the Action Books. Increased activity for those years might result from the increase in steam navigation or from the increased influx of immigrants. Thereafter, for the years 1845-48 there were only entered a total of 307 further entries. There are 641 files entered in the third Action Book, following file QVA BB[29]-44, the final suit for which a bundle of proceedings exists. These files run from file QVA D[4]-44, a wage claim by Théophile Boulet against the vessel *Jean Ann*, to file QVA T[28]-48, a wage claim by Thomas Peake against the master of the same vessel *Jean Ann*, the single-lettered references in each case indicating that the file bundles have not been found.

The entire Quebec Vice-Admiralty Court archive includes references to 3,064 cases, all but 29 of which concern identified vessels[737], and 2,342 file bundles of pleadings exist. For the 44-year period from 1805 to 1848, for which the file list appears complete, there were 3,019 suits commenced, for a yearly average of 69 files or approximately six per month. Of these, 2,335 file bundles exist, the 684 others being referred to in the registers or Action Books but not having been found. Some of these cases may have been transferred to the Quebec Court of King's

[737] Suits where no vessel is identified are usually against cargoes, either found at sea or confiscated as having been unlawfully imported, or suits taken by the Crown, but one case, *Mitchell v. Gugy*, QVA 482-27 (1827 QCVA), involves a complaint by court officials against a proctor for unpaid fees in earlier suits. The proctor was suspended by Justice Kerr and unsuccessfully sought judicial review in the King's Bench. See *Gugy v. Kerr*, Stu. K.B. 292 (1828 QCKB). For more on Mr. Gugy, see *supra*, note 734, and *infra*, note 1056.

Bench on prohibition applications and 642 files entered in the third Action Book between 1844 and 1848 have yet to be found.[738]

For the purposes of the present enquiry, the entire collection of files has been tabulated as part of the accompanying materials and the first 1,126 cases have been transcribed in full.[739] The numbers stamped on the back sheets of each file and entered in the corresponding register or Action Book have been extended by adding the prefix QVA and the suffix of the year the case commenced. Where the clerk erroneously assigned the same number to two files, the second is followed by the letter A, such that QVA 57A-10 means the second file numbered 57 initiated in 1810.

When an extant file has not been assigned a number, through an oversight of the clerk or following 1841, double letters such as QVA AA-84 are used indicating that the file commenced in 1784 exists, but was not assigned a number. Where a file referred to in a register has not been located, it is referred to with a single letter, such as QVA A-64. Single letters are assigned to all files in the first register as it ends in 1775 and the first file bundle extant dates from 1780. Single letters are also assigned to the entries in the third Action Book following 1844, for which no file bundles exist. Once any reference reaches Z or, for extant files ZZ, exponents are used. Where the clerk erroneously assigns more than one number to a file, the second number appears in square brackets.

The study of the registers and individual files of the pre-Confederation admiralty courts of Quebec City both under the French and English regimes and the parallel review of the records of

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738 This includes the 641 Action Book entries following file QVA BB^{29}-44 concerning the owners of the *Welsford*, as well as one earlier 1844 Action Book entry, for file QVA C^{4}-44, yet another claim against the *Welsford*. The vessel had been involved in a collision while en route for Liverpool and had put into Bic Harbour, where the crew were released.

739 These cases include 1,081 cases numbered by the clerk, with many numbers having been assigned to more than one case and other numbers being skipped and left out of the numbering scheme, as well as 45 cases which received no numbers at all, many having been jumbled with other files that were not untied and separated by the clerk, for which double letters have been assigned. The 1,126 files transcribed include all files extant prior to the publishing of the first regular volume of Quebec vice-admiralty cases by George Okill Stuart, Q.C., later judge of the Vice-Admiralty Court himself. Stuart published the cases of Henry Black who died in 1873 and preceded Stuart as judge. Although only published in 1858, Stuart's first volume commences with *The Agnes*, QVA 1059-36, a case from 1836, and includes a good selection of cases from that year until the end of 1856. A second volume covering 1857-73 was published by Stuart in 1875 while he was judge. A further volume of vice-admiralty decisions handed down by Stuart as judge of the court between 1873 and 1884, the year of Stuart's death, were published by William Cook in 1885. See *supra*, note 643.

the High Court of Admiralty, allows one to trace the development of *in rem* procedure on both continents from the end of the seventeenth century to Confederation and the end of the civil law domination over English admiralty practice. The Quebec Vice-Admiralty Court surpassed the Halifax Vice-Admiralty Court in instance cases,[740] and the study of the Quebec files will allow for a better understanding of *in rem* process as it existed then and as it exists today.

[740] The registers of hearings of the Quebec Vice-Admiralty Court indicate only three dozen cases being heard over the court's first decade, much less than the final decade of the French admiralty court in Quebec, as evidenced by the extant registers for 1749 to 1759. But the instance business of the court would grow exponentially in the following decades, averaging more than 60 suits per year during the period under review. As to the Halifax vice-admiralty, the lists referred to, *supra*, note 484, indicate that there were on average not more than a dozen instance cases filed per year over the period between 1784 and 1867. Most are in the Nova Scotia archives, but the LAC collection of Halifax instance cases includes not only a variety of wage claims, but claims for salvage, including the cases of the *Berrington* and the *Marianne* in volume 151, the *Brothers*, the *James* and the *Princess Amelia* in volume 152, the *Culloden* in volume 155, the *Three Sisters* in volume 157 and the cases of the *Fanny* and the *Buensuzeso* in volume 162, and claims for redress based on bottomry bonds, if somewhat rare, with the *Chance* in volume 153 and the *Lord Sheffield* in volume 157. Assault and battery matters, passenger claims, droits of admiralty and other admiralty staples are not part of the collection of instance cases in the LAC collection. Rather, the vast majority of instance cases in the LAC collection concern Crown claims, either in prize-related matters or Customs and Navigation Act suits. Lists of other cases with their own numbering scheme indicate that some file numbers might vary according to the boxes they were filed in. Further, a few instance cases bear numbers from the prize file sequence which explains why a few instance cases concerning Customs noted above had higher file numbers. The 131 instance case files in the LAC collection are probably all on the Halifax lists of cases. The instance case files remaining in the archives in Halifax run from 1784 to 1792 and again from 1834 to 1891. The instance cases in the gap between 1794 and 1818 are in the LAC collection, an average of about 5 cases per year. This can be seen from the Halifax lists of cases. Correlating the two confirms that at least 120 cases in the LAC collection are on the Halifax lists. However, instance cases can be issued against cargoes and there are several cases on the Halifax lists referring only to cargoes. The LAC collection always refers to a ship name only. The arrangement of the Halifax lists is based on document type and box number. There are no indexes or registers of the Halifax materials in the possession of LAC, but volume 165 contains a few sheets which include a list of instance cases from 1803 to 1810 as well as a small quire of sheets entitled *Instance Court Liber 3*, referring to cases filed from 1797 to 1803, and other sheets entitled *Liber 4* referring to instance cases filed from 1784 to 1797, including, at the end, a few cases from *Liber 3*. An additional list refers to instance cases ranging from 1811 to 1817. All lists are written in lead pencil and appear to be originals as they contain erasures and several items have been struck through. The references refer in some cases to page numbers in *Liber 3* or *Liber 4* and in other cases to file numbers. All instance case files referred to on these sheets are found among those held by LAC. Cases found on the *Liber 3* and *Liber 4* lists mentioned above can easily be identified. The *Liber 3* list corresponds to the cases found on pages 8 and 9 of the Halifax lists. The *Liber 4* list, which includes a few references to *Liber 3* cases, corresponds to cases found on pages 3 to 7 of the Halifax lists. The list of instance cases from 1803 to 1810 in the LAC collection mentioned above corresponds to pages 61 to 63 in the Halifax lists bearing file numbers 1 to 65 and the additional list of instance cases from 1811 to 1817 corresponds to pages 64 to 66, bearing file numbers 66 to 98, as well as a few prize-numbered cases in the 600s and 700s. A close comparison however, reveals the term *Liber* refers not to the Halifax lists but to the Halifax registers, *Liber 3* being the register now identified as volume RG1 499½ and *Liber 4* being volume RG1 497. The lists in the LAC collection are a selection of instance cases from these registers. In the table of cases in these two registers there appear similar lists along with the table of cases. Both sets of lists are of instance cases only, but it is unclear why the lists of instance cases in the LAC collection are less complete than those in the Halifax registers. The LAC lists for *Liber 3* and *Liber 4* refer to the date each was introduced and the name of the "seizer", presumably a reference to the arresting party. This information is not included in the lists in the Halifax registers. However, both refer to the

The Records of the High Court of Admiralty

Describing the evolution of the English courts of admiralty, first created during the Hundred Years War,[741] into the High Court of Admiralty and eventually into the Admiralty Division of a merged Supreme Court of England and Wales[742] is not a simple task.[743] Precisely when the English High Court of Admiralty was created may be open to debate,[744] but the engraving in the chair of the admiralty judge in the Law Courts in London states that the court began in the year 1360. That was the year the English admiralty courts of the North, West and South, were merged into one court under the judgeship of John Beauchamp.[745]

Robert de Herle replaced John Beauchamp the following year and the earliest existing admiralty court judgment was rendered "*devant Robert de Harle, admiralle de toutes les flotes … es parties de North, East et West …"* on July 26, 1361.[746] It deals with a case of capture during the Hundred Years War. The plaintiffs, William Smale and John Bronde, stated that their ship the *St. Maryboat* had been captured by John Houeel and taken to France. The ship was later recaptured and brought back to England but the English possessor did not appear. Mr. Houeel argued that there had been a war between his country and England and that the treaty of Brittany barred any claim for capture during the war. The plaintiffs objected to the multiplicity of the defendant's pleas, but de Herle rejected the objection stating that the court "… *ne serra pas rullez si estroit comme serront les autres courtz du roialme qui sont rullez par commune ley de la terre*…", and was rather governed by the "*ley marine*".

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same page numbers in the registers and thus the references to file numbers in the Halifax lists are in fact page numbers in the registers for these instance cases. See *supra*, notes 469 and 484.

741 *Select Pleas I*, *supra*, note 41 at pages xxxv *et seq* and xlii *et seq*. Marsden demonstrates that a court of admiralty was in existence well before 1390 and most likely commenced about 1340.

742 *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66. The Act came into force on November 1, 1875.

743 Although the task has been simplified by the adaptation of a few sentences from J. G. O'Connor "Expanding Admiralty Jurisdiction in Canada's Federal Courts" (2013) 44 *J. Mar. L. & Com*. 291.

744 See *supra*, note 452, suggesting it would be at the beginning of the sixteenth century. The records of the High Court of Admiralty begin during the reign of Henry VIII, a promoter of all things maritime.

745 *Rotuli Franciae* (1360), 34 Edw. III, m. 6. The text is in Proctor Latin, but an official translation of letters patent dated January 26, 1361 appointing Beauchamp's successor, Robert de Herle, states that he, like Beauchamp, was "to be the King's Admiral of all fleets of ships of the south, the north and the west, with full power of hearing plaints which touch the office of admiral and having cognizance in maritime causes … according to maritime law …." *Calendar of Patent Rolls* (1361), 35 Edw. III, vol. XI, at page 531.

746 *Smale v. Houeel*, 1361, published in (1929) XV *Camden Society Miscellaneous Publications* 1 under the title "An Early Admiralty Case". The case was found after Marsden had written his Selden Society volumes and would appear to be the earliest English admiralty court decision extant.

The statutes of Richard II in 1389 and 1391[747] are well known, and attest to the wide maritime law jurisdiction the admiralty court had developed in its first half century of existence, principally due to the continuing sea wars with France and to what the common law courts perceived as irregularities of John Holland, appointed Admiral in 1389.[748] Also well documented is the struggle between the common law courts and the courts of admiralty which lasted for 500 years, until legislation was enacted by Queen Victoria to extend Admiralty jurisdiction beyond the limited remedies then remaining.[749]

When the English courts were merged in 1875[750], the struggle was over, and any judge of the new High Court could hear any claim, with all court business, including claims formerly submitted to the High Court of Admiralty, directed to the appropriate division. Although admiralty jurisdiction would be the object of further enactments[751], such legislation was only needed to confirm and consolidate the jurisdiction of the new admiralty court for certain remedies, such as claims for which *in rem* process could be issued. There was no further need to quell the struggle between the divisions of what was now a unified court.

The admiralty courts up to a few years prior to the merger had been manned by civilians, trained in Roman and civil law and not by common lawyers trained in the Inns of Court and Inns of Chancery.[752] Like the barristers and solicitors in the common law courts, there were two distinct professions of lawyers in the admiralty courts, advocates and proctors. Advocates were trained in

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747 (1389), 13 Ric. II, stat. 1, c. 5 and (1391), 15 Ric. II, c. 3.

748 *Rotuli Franciae* (1389), 13 Ric. II, pt. 2, m. 21.

749 *Admiralty Court Act, 1840* (U.K.), 3 & 4 Vict., c. 65 and *Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10. For a full overview of the struggle, see the introduction to *Hale and Fleetwood*, *supra*, note 41.

750 With the entry into force on November 1, 1875 of the *Supreme Court of Judicature Act, 1873*. *supra*, note 742.

751 Such as the 1925 consolidation enactment, *Supreme Court of Judicature (Consolidation) Act,1925* (U.K.), 15 & 16 Geo. V, c. 49.

752 Common law was also taught in the universities, starting with William Blackstone's lectures at Oxford in the 1750s and 1760s. See *infra*, note 1079. But enrollment in an Inn of Court was required to qualify as a barrister, whereas the civilians were solely trained in civil law at the universities. However, the civilians lost their standing in the admiralty courts on August 8, 1859 with the adoption of the *An Act to enable Serjeants, Barristers-at-Law, Attorneys and Solicitors to practice in the High Court of Admiralty*, 1859 (U.K.), 22 & 23 Vict., c. 6. This followed upon the coming into force on January 1, 1858 of the *Court of Probate Act*, 1857 (U.K.), 20 & 21 Vict., c. 77, ss. 40-45, allowing civilians to practice in the common law courts. But it also signalled the end of the monopoly of the civilians, and thus led to the demise of the professions of the advocates and proctors. See also *supra*, note 572.

the civil law faculties of Oxford and Cambridge Universities and were doctors of law. The proctors were trained through a seven-year articling period before being admitted to practice.[753]

During their five centuries of pre-merger existence, the admiralty courts kept their own records and proceedings. The remaining records of the High Court of Admiralty are today kept under the HCA class in the Kew unit of the National Archives outside of London. The earliest records of the English admiralty courts have not survived, but a large collection of records exist from the middle of the sixteenth century until the merger, three centuries later.

The records of the High Court of Admiralty, like those of the ecclesiastic courts manned by the English civilians, are not arranged in a modern, file-by-file manner, but are grouped together according to the type of document involved. This is perhaps not surprising, as the English courts of common law had started as courts of oral pleadings only and, from the Middle Ages, the main records of the courts were the Plea Rolls,[754] enrolling proceedings much as did the registers of the admiralty courts. Written pleadings, once developed, were not retained as part of the record.

There are 65 subdivisions of the HCA class in the National Archives at Kew. They include the registers and papers of the civil or instance side of the High Court of Admiralty as well as those of its criminal side and of its prize side. The instance jurisdiction of the court settled disputes of a commercial nature as well as disputes over wages, collisions, salvage and droits of admiralty. The criminal side had jurisdiction over crimes committed at sea and the prize jurisdiction heard cases concerning the issuance of letters of marque and the division of enemy ships and other spoils captured at sea during time of war.

Following the Restoration, and during the reign of Charles II, the records and the work of the prize and instance branches of the court were separated and thus, during the entire period under

753 There were only 34 proctors according to the ordinance of the Archbishop of Cantabury of 1696. See U.K., H.C., "Bye-laws and Rules of Ecclesiastical Court of Doctors' Commons regulating Admission of Proctors. A return of the statute by which the admission of proctors is regulated", *Sessonal Papers*, No. 439 (1826-27).

754 There are more than 6,500 plea rolls for the common law courts of King's Bench and Common Pleas running continuously from the reign of Richard the Lion Hearted to the merger of the courts in 1875. The rolls are unwieldy and in Latin until Latin was replaced by English on March 25, 1733. See the *Proceedings in Courts of Justice Act*, 1730 (U.K.), 4 Geo. II, c. 26. And see *infra*, note 770.

review, the instance court records stand on their own. The criminal work, often dubbed Admiralty Sessions, continued until the creation of the Central Criminal Courts in 1834.[755]

The present enquiry involves the study of the *in rem* jurisdiction of the instance court and thus there is little need to explore the prize or criminal work of the court. That said, the HCA records for the instance court are contained in 37 of the 65 HCA classes, many of which are in part combined with prize work prior to the Restoration. The criminal classes are principally HCA 1 (Oyer and Terminer Records) and HCA 55 (Criminal Court Warrants).

Methodology

The volume of HCA records raises the issue of the appropriate methodology of their study. If methodology can be defined as the study of the suitability of techniques employed in carrying out empirical research, then methodology is especially important in the study of original archival materials such as those of the High Court of Admiralty, where research involves conclusions drawn from documents selected from amongst the entire archive. If an archive is reasonably complete and the researcher is able to review the entire archive, methodology pales in importance, as conclusions cannot be said to be based on sampling or extrapolation.

For the purposes of the present enquiry, the original archival records of the Quebec admiralty court under the French regime, those of the Quebec Vice-Admiralty Court under the British regime and select documents from the English High Court of Admiralty have been reviewed. As concerns the records of the French and British admiralty courts of Quebec, the entire extant archives have been reviewed for the period under review. As these archives are relatively complete for the period, few issues arise concerning the methodology of review of the records of these courts.

However, methodology becomes important and sampling needs to be validated for the High Court of Admiralty archives. This is because the British archive is very large and very arcane in its filing methods. The High Court of Admiralty, like the other English civil law courts, divided all documents into categories and filing was by category. As a case made its way through the

[755] An excellent description of the criminal courts of admiralty is found in *Hale and Fleetwood*, *supra*, note 41. Yale and Prichard refer at page cxxxvii to Mr. Bell's introduction, *Criminal records of the High Court of Admiralty (HCA 1)*, now found in the HCA Class List at Kew.

court, the originating process, including the affidavit to lead warrant, was kept separately from the warrant it generated, the warrant was kept separately from the Warrant Book entry that led to its issue, the libel and answer were kept separately from the interrogatories based on each, the answers thereto were kept separately from the questions they answered, the exhibits were kept separately from all other categories and the judgments or decrees were filed separately from the pleadings in the suits they governed.

The study of any one complete file before the High Court of Admiralty was possibly never intended to take place, and it is not clear whether the proctors could even have access to all court records. In today's world of archival preservation, no researcher can have access to such a large number of documents simultaneously, and in the British National Archives it is virtually impossible to have possession of any complete admiralty suit at one time.

In the colonies, methods were similar, and the archives of Quebec from the French period reveal that the admiralty courts there kept records in much the same manner, if in less numerous categories. But the Quebec Vice-Admiralty Court was more recent, and somewhat more modern. Perhaps due to a lack of personnel, files were bundled together much as they are today, with all documentation concerning a particular case grouped together. This may be beneficial for the modern researcher, but from the study of the files it is clear that the proctors made no more use of, and indeed may have had no more access to, these bundles of files than their contemporaries made use of the admiralty records in England.

The selection of British documents to be reviewed as part of this enquiry involved the review of select classes of records retained in the National Archives in Kew, essentially in preparation of a table containing all entries made in the Warrant Books during the period under review and the review of certain related entries in the Act Books and Assignation Books.

The review of the records of the instance court's *in rem* process involved the study of the principal admiralty records which are found in classes HCA 3, HCA 5-7, HCA 12, HCA 13, HCA 15-19, HCA 23, HCA 24, HCA 30, HCA 38 and HCA 39. An overview of these classes will explain their importance.

Class HCA 3 contains the Act Books as well as minutes or draft entries to be made in the Act Books. The Act Books formally record all business of the High Court of Admiralty and are thus extremely important records. There are 74 Act Books for instance business covering the period from 1524 to 1749. Separate Act Books were maintained for prize business. For the period under review, each instance Act Book is elephant-sized and contains hundreds of pages and thousands of entries covering three or four years of business. There is an index in each Act Book by ship and party name showing the various pages in the volume where cases are considered as each suit could come before the court multiple times before a final decision, and the Act Books are completed in a purely chronological manner, leaving no space for additional entries.

The Act Books are written in Latin up to 1733 with the exception of the interregnum period.[756] They are written in a fair court hand, transcribed by clerks from the minutes of select acts which in turn were prepared from notes written in the Assignation Books, many taken in open court as the proceedings were underway. Minutes of acts for instance business exist from 1577 to 1752. Not all minutes are copied into the Act Books however, and some minutes became redundant between the proceeding and the formal preparation of the Act Book. For the purposes of the present enquiry, the usefulness of the Act Books is to validate the nature of claims made, as well as ship and party names listed in the Warrant Books, but the issuance of a warrant of arrest of persons or property was solely recorded in the Warrant Books.

Classes HCA 5-7 contain the Assignation Books, another set of records recording the activities of the instance court. Separate Assignation Books were maintained for prize business. The Assignation Books are approximately A4 in size and contain in a neat hand the names of vessels in bold face with notes added in open court or immediately following a hearing, of steps taken with regard to the suit. The Assignation books record chronologically the business of court sittings, such as that a party is to "libel with sureties" and although the issuance of a warrant of arrest is not mentioned in the Assignation Books, the return of the executed warrant is often recorded as the first entry for a suit in the Assignation Books.

The information contained in the Assignation Books was to be later expanded and included in the Act Books and the Assignation Books were thus considered to be less authoritative than the

[756] See *supra*, note754 and *infra*, note770.

Act Books. Consequently, for class HCA 5, the first 112 of what were once 142 Assignation books were destroyed in the early twentieth century by the British archives. Volumes 113 to 142, covering 1747-67, were retained as the Act Books for that period were never fully prepared.[757]

Classes HCA 6 and 7 continue the instance Assignation Books where class 5 left off, with a total of 60 additional instance volumes covering the period from 1767 to 1864. It is unclear why the series was split into three classes. But more intriguing still, is why the Assignation Books continued to be prepared and yet the more authoritative Act Books were not continued beyond 1749. It is due to this interruption that the later Assignation Books have been retained in the National Archives at Kew.

Class HCA 12 contains only one book called the Black Book of the Admiralty. The adjective black is related to the colour of the binding, which was originally black leather, although it no longer appears black due to wear and tear over the centuries. The book is small, only 24 cm in height and 17 cm in width. Portions of the book are decorated in gold leaf and the initial letters of each chapter are decorated in blue and red ink.

The Black Book of the Admiralty is a collection of texts concerning maritime law. Twiss edited the content of the Black Book in the 1870s.[758] At the time the actual Black Book had been missing in the Public Record Office for years, and Twiss reconstructed its content prior to the volume being re-located. Twiss thus edited the re-constructed text in the first volume and corrected the reconstruction in the fourth after the Black Book resurfaced.[759] For present purposes, the most important chapter of the Black Book is the *Ordo Judiciorum* described above.[760]

Class HCA 13 contains examinations and answers. Examinations were held of witnesses before the registrar or a commissioner appointed to take statements from witnesses.[761] The HCA 13 class contains signed statements of witnesses in both prize and instance examinations, principally

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757 When the earlier Assignation Books were destroyed, volume 2 for 1671-1673 somehow escaped the fate of the other volumes and is in the archives at Kew.
758 *Supra*, note 26.
759 *Ibid.* Vol. 4, pages 132-144.
760 See the text accompanying note 223 above.
761 The commission examinations are in volumes 224 to 271 covering 1564 to 1678.

over the period from 1536 to 1750.[762] The answers portion of HCA 13 are not witnesses' answers to interrogatories, but rather formal pleadings in defence to statements of claim, called libels in civil law terminology. The answers collection runs from 1577 to 1770.

Marsden diminished the usefulness of examinations, arguing that their only use is to elucidate the series of libels.[763] However, this is not universally agreed[764] and examinations often elucidate cases that are otherwise difficult to decipher.[765] In fact, the examinations in civil law cases are a unique source of information about the cases and are of themselves worthy of historical study.

Classes HCA 15-19 contain what are referred to as instance papers, and include instance court documents dating from 1650 to the merger of the courts in 1875, as well as some prize court documents of even earlier vintage. The papers are arranged chronologically in over 560 pieces containing more than 12,000 bundles of documents.[766] Items are arranged alphabetically by ship name and include a wide variety of documents ranging from contracts, charter-parties and other agreements to first decrees, letters, invoices and prohibitions and orders in council. The documents might be considered to include what would be exhibits in the suit, but that description is too narrow for the vast array of documents in this class.

Class HCA 23 contains interrogatories and is indirectly related to HCA 13. Interrogatories were formal questions drafted by the proctors for each party, put to witnesses following their general examination on the libel or answer or both. Answers to interrogatories are found in the corresponding examination file. In the slightly more modern practice of the Quebec Vice-

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762 Volumes 1 to 91 cover 1536 to 1750 while volumes 92 to 99 contain supplementary examinations.

763 Marsden, *Select Pleas II*, above, note 41, at lxxv.

764 And the review of the files of the Quebec Vice-Admiralty Court has depended greatly on the factual information not appearing in the pleadings, but solely in the examinations and answers.

765 This is certainly part of what the late Professor Simpson would have argued as bringing us closer to legal reality. See A. W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1995), at page 11.

766 Or, at least the documents were originally in bundles. The records in the HCA 15-19 series of instance papers are not an easy read. That they were at some point attached in bundles can be surmised from the multitude of pink ribbons in the bottom of many of the boxes where they are found, but the documents are no longer bundled, and identifying which document belongs to which ship can require a great deal of patience. Documents are for the most part arranged alphabetically by ship name in large boxes over a period of two to three decades, following which the arrangement recommences with, say, ship names starting with A to D for the next period in the next box. Linguistically, the documents can be challenging as well. See *infra*, note 770.

Admiralty Court, the answers to interrogatories were written on sheets of paper reproducing both the interrogatories and the answers given.[767]

Class HCA 24 contains libels and allegations, statements of claim and defence in more modern terminology, as well as draft and final decrees of the prize and instance Admiralty courts. In general terms this class contains the pleadings whereas classes 15-19 contain various documents and exhibits. There are 176 pieces in the HCA 24 series, but the most important part for present purposes is pieces 1-139 as they contain the libels and allegations covering the period 1526-1739. Pieces 141-151 contain allegations for select years and pieces 152-176 contain allegations in prize.

Cases selected from HCA 24/1-69 have been published by Marsden.[768] Marsden considered class HCA 24 to be the most important indication of the business actually transacted by the High Court of Admiralty.[769] He noted the variety of documents contained in the class, which goes well beyond libels and allegations, and includes:

> ... a miscellaneous collection of documents connected with the suits before the Court, such as articles for the examination of witnesses; interrogatories; 'businesses' (*negotia*) for contempt or for the recovery of the admiral's droits; commissions for the examination of witnesses in causes, or, *ex parte*, *in perpetuam rei memoriam*; these were addressed sometimes to civilians or other persons in this country, and sometimes to foreign courts or admiralties; appeals from vice-admiralty courts; matters connected with appeals to the King in Chancery; references to arbitration and awards of arbitrators; writs of prohibition, supersedeas, and certiorari; complaints (*querelae*) as to injuries suffered at the hands of foreign princes and their subjects; commissions to inquire into wrecks and pillage of wrecks, or into spoil, or robbery at sea; complaints and petitions to the Privy Council or to the admiral touching spoil and piracy; charter-parties; policies of insurance; bills of sale of ships and goods; bills of exchange; bills of lading; indentures of receipt for ships and goods delivered up in pursuance of orders of the Court; orders for, and indentures of, appraisement; bills of costs; a

[767] There are 25 bundles of High Court of Admiralty instance interrogatories spanning 1546-1733 and, until the Restoration in bundle 20, each bundle contains both instance and prize interrogatories, thereafter the two were split and the final five bundles 21-25 are instance interrogatories only. Prize interrogatories following the Restoration occupy bundles 26-30.

[768] Marsden, *Select Pleas I* and *II*, *supra*, note 41.

[769] Marsden, *Select Pleas I*, *supra*, note 41 at pages lxi *et seq*.

> few warrants to arrest or to cite; proclamations; letters of safe conduct; and a variety of papers and documents too numerous to specify in detail.[770]

Marsden was of course interested in the earliest admiralty materials. The present enquiry is concerned with eighteenth and nineteenth century developments and the libel files end as the period begins. The final few pieces of HCA 24 are of limited use in the overall review of the period under review.

Similarly, class HCA 30 has been of limited use to the present study. It contains a wide variety of admiralty papers, not all of which have been produced by the court. Of interest are some instance appeal papers, but they are fragmentary and have not been of assistance in tracing appeals to the High Court of Admiralty from vice-admiralty sources.[771] Of general interest is the prohibition gathering, containing descriptions of prohibitions issued to the High Court of Admiralty, principally in the seventeenth century. These are résumés prepared by admiralty practitioners and

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[770] *Ibid*., at page lxi. The variety of types of document and the large spread of dates result in some documents being in English and others in Latin. Latin had always been a formalistic language for the proctors and, from Marsden's volumes, it can be seen that English was often introduced into the pleadings, even from the earliest High Court of Admiralty records. During the Interregnum, on November 22, 1650, an Act was passed entitled *An Act for turning the books of the Law and all Process and Proceedings in Courts of Justice, into English*. See *Acts and Ordinances of the Interregnum*, *supra*, note 458, vol. II, at page 456. This was hardly the first time that Parliament had tried to force the English language on the courts. See the ill-fated *Pleadings in English Act*, 1362 (U.K.), 36 Edw. III, c.15, an Act drafted and adopted in French only, and promptly disregarded by the medieval courts. The Interregnum legislation provided for the use of English in all books of the law of England, and all pleadings were to be in English only. The legislation was applied in the Court of Admiralty during the Interregnum, but a second Act, passed on April 9, 1651, entitled *An Additional Act concerning the proceedings of the Law in English*, *ibid*., at page 510, provided that the requirement would not infringe upon the certifying of pleadings by the Court of Admiralty, where the certifying was for a foreign court or government, the text of which could remain in Latin. However, upon the Restoration, the Interregnum records were deemed to be valid and to be in Latin, which once again became the language of the court records. This would again change on March 25, 1733 when the *Proceedings in Courts of Justice Act*, 1730 (U.K.), 4 Geo. II, c. 26 came into force. Even that Act maintained the exception of the certification of pleadings in admiralty for foreign courts. In fact, during the period under review prior to 1733, the use of Latin was constant in the Act Books and Warrant Books, but much less so in the individual files and pleadings, found in HCA 15-19 and HCA 24, where English was very much in vogue. Some proctors were doubtlessly more proficient in Latin than others, and there are pleadings in that language, but they are in a minority position. Most libels, allegations and interrogatories during the period found at HCA 24, bear formal Latin headings identifying the court, the judge and the parties, as well as conclusions setting out the remedy sought, but the detailed paragraphs between the two are introduced, for the first paragraph, by the words *In primis* and, for all others, by *Item*, but then followed by "that ..." describing in English the facts being alleged. Latin was still used, not only in the formal records, but in the formal decrees of the court, as well as in standard form documents, such as stipulations, powers of attorney, etc., often found at HCA 15-19, but was left aside whenever an original point was to be made, perhaps as it always had been since the creation of the court.

[771] Sub-classes HCA 30/574 and 575 contain several appeal files listed alphabetically by ship name, but the collection is incomplete. Class HCA 49 is entitled Vice-Admiralty Courts Proceedings. However, the records contained in the series relate only to a few vice-admiralty courts and the courts in Quebec are not among the court documents included.

contain references to Plea Roll cases that have never been fully explored, but confirm the struggle between the courts.[772]

Class HCA 38 contains the Warrant Books of the High Court of Admiralty. There are 80 books in the series, all of approximately A4 size and bound into volumes covering two or three years. The series covers 1541 to 1859 although coverage is not complete as there is at least one book missing during the period under review, containing warrants issued between January 1745 and February 1747. The continuous spine numbering of the Warrant Books indicates that this volume went missing long ago. There is also a large gap between 1774 and 1858. Warrant Book 78 ends in October 1774. The next book in the series, volume 79, is not actually a Warrant Book but a book of accounts of fees and of the transfer of prisoners for the Admiralty Sessions of criminal proceedings.

Volume 80, the last in the series, recommences with entries from October 1858 to December 1859. This final volume is styled an Action Book, but is in fact a Warrant Book in every aspect. By the nineteenth century there were printed admiralty stamps placed next to each entry over which has been written "extracted", confirming that the warrant of arrest had been issued. At the end of the entries in volume 80 is written "For commencement of new causes after 31 December 1859 see Cause Book" but no cause books have survived.[773]

Warrant Books are registers of warrants issued for the arrest of ships, shares in ships, cargoes, freight, proceeds of sale and persons. Entries are made in the handwriting of the proctors acting for the arresting party and thus vary greatly in tidiness. Throughout the period under review, the proctor signs each entry in the margin. Warrants are simply an authorization issued in writing authorizing the addressee to perform some act. Warrants for arrest were issued in the period under review in the name of the king and addressed to the marshal authorizing him to arrest

[772] Sub-classes HCA 30/3, 4 and 542. See the description of the prohibitions gathering in *Hale and Fleetwood*, *supra*, note 41 at xlix.

[773] With the arrival of the common lawyers in 1859, the records of the High Court of Admiralty changed. From 1860 Cause Books replaced the Action Book, volume 80 of class HCA 38. Instance Minute Books were also prepared from 1860, containing brief notes of steps taken on a ship-by-ship basis, replacing the chronological Assignation Books. The Minute Books from 1860 are in the National Archives class HCA 27, but considering that the transactions recorded in the Minute Books were more fully detailed than in the corresponding Cause Books, presumably filled in in open court, the latter records were destroyed under the authority of a destruction schedule of 21 September 1915.

some ship, property or person. They were written on parchment in England although in Quebec they were written on paper.

During the period under review, each Warrant Book is divided into two parts. The front portion of each book contains the entries of warrants issued, and the back portion the details of the sureties or bails that were issued to get the arrested ship or person released.

Not all warrants issued resulted in sureties being appointed. There are probably several reasons for this. The issuing of a warrant of arrest was the first step in an admiralty proceeding. Many cases were thereafter settled or otherwise abandoned, for example where a ship sailed prior to being arrested.[774] Even in modern times, a great percentage of admiralty cases settle prior to trial.[775] In this sense, the Warrant Books cannot be a true reflection of the actual workload of the High Court of Admiralty in that only a fraction of the warrants issued actually resulted in court business and in judgments.

Copies of original warrants are found in class HCA 39 which contains warrants returned into court following service between 1515 and 1761. Returned warrants bear the affidavit of the serving officer, usually the marshal, and the affidavits are on paper. However, class HCA 39 is incomplete and, despite its name, contains not only warrants but monitions, subpoenas or compulsories and interlocutory and final decrees.

The principal aim of the present enquiry is the review of *in rem* process in Quebec during the eighteenth and nineteenth centuries, but, as previously stated, the study of Canadian admiralty proceedings requires the parallel study of select British admiralty proceedings during the same period. Consequently, from a methodological point of view, the Warrant Books of class HCA 38 constitute the principal class of British document of interest to the present enquiry.

In fact, with the exception of the final decade of the period under review, judicial statistics for the civil courts were not tabulated, and the Warrant Books are the only reliable source of the issuing of High Court of Admiralty arrest warrants against ships, cargoes, freight and against

[774] Or even after being arrested. There were many cases of absconding ships in Quebec and one can only imagine in England as well.

[775] The judicial statistics of Canada's Federal Courts can be found online at http://www.fct-cf.gc.ca/fc_cf_en/Statistics.html.

persons, including owners, masters and crews of the subject vessels. The issuance of warrants was not recorded in the Assignation Books, although the return of the executed warrant was sometimes, but not always, mentioned at the beginning of the first entry of an action in the Assignation Books. However, warrants were not entered in the more formal Act Books.

Assignation Books exist for most of the period under review, but those prior to 1747 were destroyed as they were viewed as inferior records to the Act Books. However, the Assignation Books were designed to be completed in open court and many cases never got that far where, for example, the warrant could not be served. Thus, only the Warrant Books, which had to be filled in whenever a warrant was sought, contain a complete list of warrants issued by the High Court of Admiralty.

As will be demonstrated in this enquiry, in Quebec and in London, the commencement of an instance suit in admiralty required a proctor to seek the arrest of something or someone. Virtually no instance action filed in the period under review was commenced without a warrant being sought. Whether the warrant was served or not is a matter of the particular history of each suit, and certainly not all warrants were served. In fact, many were likely issued as part of an attempt to convince the defendant shipowner or master to pay an outstanding debt without incurring legal fees.

In Quebec, the practice of having a claimant's proctor make a Warrant Book entry in order to obtain a warrant of arrest commenced in August of 1832, with the coming into force of rule 7 of the 1832 Rules made pursuant to the 1832 Act.[776] Prior to that date, the preparation of an affidavit to obtain the issuance of a warrant of arrest had been required in each action, probably since January 28, 1801,[777] but the warrant was obtained by the direct authority of the vice-admiralty judge. With the advent of the 1832 Rules, the judge's participation was no longer required and warrants could be issued in Quebec, as in England, by the court registrar once the entry was made in what was then to be called the Action Books but which was in reality a series of Warrant Books.

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[776] See *supra*, note 731.

[777] See the order of that date issued by Sir William Scott, reproduced in Marriott, *Formulare Instrumentorum*, *supra*, note 355, at page 31.

Consequently, for the purposes of this enquiry, the more than 3,000 extant Quebec admiralty records and files have been reviewed. Reporting of the decisions of the Quebec Vice-Admiralty Court commences with the reports of George Okill Stuart in 1836. In order to better understand the working of the court prior to that date, select pleadings from more than 1,000 court files prior to 1836 have been transcribed as part of the accompanying materials. Further, all extant Quebec Vice-Admiralty Court files and references to files in the Action Books have been tabulated to help create judicial statistics for the court and to better understand *in rem* process.

For the English High Court of Admiralty, similar efforts have been undertaken. Warrant Book volumes 52 to 80 of the London court, covering the years 1699 to 1859, have been reviewed in detail and their contents have been tabulated as part of the accompanying materials. These volumes are the sole record of warrants issued in the eighteenth and nineteenth centuries, and correspond to the period under review in Quebec. By reviewing the Warrant Books, the arrest warrants issued, and the security filed on behalf of the property or person arrested, it is possible to see the development of *in rem* process in England in parallel to that in Quebec.

The collecting of judicial statistics would only begin in England in 1858. Had statistics been kept for the period under review, it might have been possible to answer the queries set out in this enquiry without the need to study the Warrant Books or Action Books. But statistics establishing numbers of instance suits *in rem* and *in personam* do not exist prior to 1858. The tabulation of Warrant Book and Action Book entries is the only method available to obtain the missing statistics. And statistics for the Quebec court were simply not undertaken for any portion of the period under review.

The review of the full records available in Quebec, and of the corresponding English records, will thus help advance the study of admiralty process throughout the period under review, by revealing the development of the admiralty action *in rem*.

THE PROCESS OF THE ADMIRALTY COURT OF QUEBEC

As has been explained, the French regime created a permanent specialized admiralty court in Quebec in 1719, following the enactment of the Règlement of 1717.[778] But that court was preceded by the Court of Prévôté, which heard civil, criminal and maritime cases from its creation in 1666 and, following the enactment of the Ordonnance of 1681, had been styled the Court of Prévôté et Amirauté. Prior to the creation of a permanent admiralty court, the lieutenants of the Court of Prévôté et Amirauté had held sittings in admiralty, at least from the very beginning of the period under review.

Thus, in 1701 and 1702,[779] there are separate lists of admiralty cases heard by the lieutenants and referring to the admiralty court by name, even though no specialized admiralty court had yet been created for New France. These cases were heard shortly after the first attempt to create the position of lieutenant of the admiralty in New France in 1699.[780] It was clear that the French felt they needed a permanent specialized maritime court in Quebec City.

From its creation until the British arrived in Quebec City in 1759, the French court kept the records required by the Ordonnance of 1681 and applied the rules of procedure set out in therein and in the Ordonnances of 1667 and 1673. This raises the question of the application of these important pieces of legislation in the colonies.

The Application of Ordonnances in Quebec

The question has been raised as to the application of royal ordonnances in New France. For present purposes, the application of the Ordonnance of 1667, the Ordonnance of 1673, the Ordonnance of 1681 and the Règlement of 1717 are of prime importance in this regard. There can be little doubt that all were applied, *de facto*, in the courts of Quebec. But were they legislatively binding on those courts? In France, the parlements were not only courts of justice but repositories of legislation enacted by royal authority. Ordonnances were to be *insinuated* or registered, with a view of rendering them official and applicable. In the colonies, the practice was less rigorously applied. Certain ordonnances were registered in Quebec's Conseil supérieur.

778 See the text accompanying note 673 above.
779 See the text accompanying notes 660 and 661 above.
780 For the attempt to appoint a French lieutenant of the admiralty in 1699, see the text accompanying note 670 above.

More to the point, the Ordonnance of 1667 was registered in the Conseil in Quebec on November 7, 1678.[781] An edict confirming the application of the Ordonnance of 1667 in New France was registered in Quebec on October 23, 1679.[782] Similarly, the Règlement of 1717 was registered in Quebec on November 22, 1717.[783] But the Custom of Paris was never registered in Quebec.[784] Nor was the Ordonannce of 1673 or, of more importance for present purposes, the Ordonnance of 1681. Does this mean they were inapplicable?

With regard to the Custom of Paris, the publication of the code a century before the arrival of Champlain in Quebec would suffice to explain why it would not require registration. The French brought their laws with them, and there was no need to register laws adopted prior to their arrival. However, the Ordonnance of 1681, like those of 1667 and 1673, was adopted during the existence of the colony. Why was one registered and the others not?

This question has been canvassed by the courts and by legal commentators in Quebec. In the case *Baldwin v. Gibbon*,[785] a shipbuilder obtained judgment for the unpaid portion of a ship delivered to the defendant. During the proceedings, the defendant sold the ship to a third party, who registered it in his name. The shipbuilder relied on the Ordonnance of 1681 to argue that the former owner's debt followed the ship into the hands of the new owner, up to the point where the ship undertook its first voyage under the new ownership.[786]

This argument was rejected, the Quebec Court of King's Bench holding that the creation of the vice-admiralty in 1764 introduced English maritime law in place of French. The court stated

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781 Conseil supérieur register A at folio 93. *Édits et Ordonances*, *supra*, note 251, at page 106. For the Ordonnance of 1667, see note 251 above. The Ordonnances of 1667 and 1673 and the Custom of Paris, unlike the Ordonnance of 1681, would continue to apply in Quebec following the revival of French law under the *Quebec Act*, 1774 (U.K.), 14 Geo. III, c. 83. The Ordonnance of 1667 and the Custom of Paris would only be fully replaced by the Quebec codifications of 1866. However, prior to codification, the provincial parliament would amend the French legislation to meet the needs of Quebec. See, for example, *An Act to amend the Code Civile* [*sic*], (1801), 41 Geo. III, c. 8, amending Title 22, art. 11 of the Ordonnance of 1667 as concerns cousins called as witnesses in civil suits. For commercial matters, the Ordonnance of 1673 would also continue to be applied until replaced, but not always by amending enactments. For example, the rules of evidence were to become those applicable in England. See the provincial *Ordinance establishing Trial by Jury* (1785), 25 Geo. III, c. 2, art. 10.

782 Conseil supérieur register A, folio 80. *Édits et Ordonances*, *supra*, note 251, at page 236.

783 Conseil supérieur register D, folio 77. *Édits et Ordonances*, *supra*, note 251, at page 358. The Règlement of 1717 had, at any rate, been decreed by letters patent to apply in Quebec. *Ibid*., at page 365.

784 Custom of Paris, *supra*, note 270.

785 *Baldwin v. Gibbon* (1813), Stu. K.B. 72 (QCKB).

786 Ordonnance of 1681, *supra*, note 268, Book II, title X, art. 2.

further that the Ordonnance of 1681 would have had to be registered to find application in Quebec, as it formed no part of the general laws of Canada. This view of the court would have been much stronger following the enactment of the *Colonial Courts of Admiralty Act, 1890*.[787] But it has been criticised as contrary to the *Quebec Act* of 1774 which re-established the former French laws and customs received in Quebec unless and until varied or altered by enacted law.[788] Were French ordonnances applicable as part of that law if they were not registered by the Conseil supérieur? The Privy Council has decided that they were not, but that view has been criticized by Canada's Supreme Court.[789]

Prior to the arrival of the British, the French do not appear to have considered the non-registration as a fatality, and more recent authors have argued that the decisions of the Privy Council are not of precedential value for any ordonnance other than those giving rise to the litigation involved.[790] This is especially applicable to the Ordonnance of 1681. Although not registered in the Conseil supérieur, the Ordonnance of 1681 was clearly applicable in New France and no judgment under the French or English regime has stated the contrary. That application has three separate foundations.

First, the enforcement of the Ordonnance of 1681 was expressly stated as being the reason for which the admiralty courts were created for the colonies, including New France. In the preamble to the Règlement of 1717, it is stated that the necessity of creating specialized admiralty courts in the colonies was that the Ordonnance of 1681 was not being applied properly, due to the absence of knowledgeable admiralty judges and practitioners.[791] The first section of title I of the Règlement of 1717 goes on to state that these new admiralty courts are to hold the exclusive jurisdiction to determine maritime cases. The first section of title III of the Règlement of 1717 repeats this jurisdiction in first instance, with appeals to the Conseil supérieur. Surely, the

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787 *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27.

788 *Quebec Act*, 1774 (U.K.), 14 Geo. III, c. 83, s. VIII. See Pouliot, *supra*, note 259, at pages 19 *et seq*.

789 *Les Sœurs de l'Hôtel-Dieu de Montréal v. Middlemiss* (1878), 3 App. Cas. 1102, at page 1119 (P.C.). See also *Symes v. Cuvillier* (1880), 5 App. Cas. 138, at page 157 (P.C.). But the Supreme Court of Canada took the view that the Privy Council had decided the point without debate and that, under the French regime, registration was not considered necessary. See *Groulx v. Bricault* (1921), 63 S.C.R. 32, at 42, *per* Mignault, J.

790 See Pouliot, *supra*, note 259, at page 26.

791 *Édits et Ordonances*, *supra*, note 251, at page 358. By letters patent, the Règlement of 1717 was expressly made applicable to New France. *Ibid*., at page 365.

creation of a permanent court of admiralty at Québec in 1719 was irrefutable evidence of the French king's desire to see the Ordonnance of 1681 applied in New France.

Secondly, The Règlement of 1717 and the letters patent of the same date were sent to Quebec and registered in the Conseil supérieur on November 22, 1717. The registration of the letters patent has been called a tacit registration of the Ordonnance of 1681.[792]

Finally, as shall be seen, the French admiralty court rendered judgments based on all books of the Ordonnance of 1681. The three extant registers of hearings all contain references to a number of provisions of the Ordonnance of 1681, without once their application being contested. Each point of contestation was mentioned in the registers, and it would appear impossible that any question of the application of the legislation upon which the judgments were founded would not be mentioned in the record.

Similar arguments could be made for the Ordonnance of 1673. The commercial rules it contained were applied in the Court of Prévôté and references to the instrument are frequent in the registers of that court, even though it was never formally registered.[793]

It is thus concluded that the Ordonance of 1673 and the Ordonnance of 1681 were just as applicable in New France as the Ordonnance of 1667, the Règlement of 1717 and indeed the Custom of Paris. And the Ordonnance of 1681 was the backbone of the marine jurisdiction exercised by the admiralty court.

The Jurisdiction of the Admiralty Court of Quebec

The Admiralty Court of Quebec was in operation for 40 years from 1719 to 1759. The extant registers of the court cover the second half of the court's existence. Those of the first half have been lost. However, as pointed out above, there exists a report of the registers and documents of the court in 1737, which immediately precedes the commencement of the existing registers, and confirms the size and number of registers kept by the court during the first half of its existence.[794] A review of what still exists, combined with a report of what existed immediately prior to the

[792] Pouliot, *supra*, note 259, at page 30. See note 782 above.
[793] See Lareau, *Histoire du droit canadien*, *supra*, note 267, vol. 2 at page 318.
[794] See the text accompanying note 691 above.

commencement of the extant records, provides a good idea of what jurisdiction the court exercised.

The Règlement of 1717 gave the new court exclusive jurisdiction in maritime matters arising out of the Ordonnance of 1681. These powers had previously been exercised by the judges of Prévôté et Amirauté, a style that was adopted in New France shortly after the enactment of the Ordonnance of 1681. Although the records and number of cases handled by the court in its first two decades are described in detail in the 1737 report, the jurisdiction actually exercised can only be surmised from the Ordonnance of 1681, and from the fact that the records described in 1737 closely parallel the records mandated by the ordonnance, with the exception of the roll of masters and the list of local vessels, the sole register not maintained in Quebec.[795]

The admiralty court in Quebec was presided over by a lieutenant or judge, appointed by the admiral of France. There were no lawyers or advocates in New France, but there were notaries and other officers of the Conseil supérieur and of the Prévôté. All of these persons could appear as counsel to a party before the court of admiralty. The most common counsel were the notaries, many of whom appear dozens of times in the registers of hearings.

For the second half of the court's existence, the extant registers of hearings are a clear indication of the jurisdiction of the court. These registers were doubtlessly the most important registers kept by the court. As noted above, the French-regime attorney-general Verrier said so in his report of 1737. And the registers of judgments rendered on documents alone, even assuming that several uncontested judgments could be entered on each folio page, only amounted to 20 pages at the time of Verrier's report. That these volumes continued to be kept is obvious, from the multiple references in the three extant registers of hearings, to contemporaneous decisions of the court that do not appear in the three registers.

The three registers of hearings demonstrate the jurisdiction of the admiralty court. Decisions cover civil and criminal activity as well as prize jurisdiction. That the admiralty courts had extensive jurisdiction over all aspects of marine commerce, and life and death on board vessels, is obvious from a reading of Title II of Book I of the Ordonnance of 1681.

[795] See the text accompanying note 697 above.

The court's jurisdiction covered all aspects of marine commerce, including the carriage of goods, the chartering of vessels of all kinds, wage disputes, insurance policies and bottomry contracts.[796] It also included all aspects of marine incidents involving ships, their crews, pilots, passengers and cargoes, through navigational errors, collisions, groundings, fires and general average.[797] The court handled all rights of the admiral or *droits* of admiralty over fishing rights, and even the sale of the fish caught or washed onto shore, and over anchorage rights, aids to navigation, docks, quays and haulage slips, and dredging contracts.[798]

From a public point of view, the court handled claims concerning prize and letters of marque or reprisals and could hear piracy cases and marine crimes committed on board or on shore in ports and harbours.[799] The protection and defence of the coastline and the coast guard were also of the court's jurisdiction.[800] Death at sea, the estates of mariners and their well-being as crew members were also covered.[801]

Virtually all aspects of this generous jurisdiction appear in the extant registers of hearings of the admiralty court, although some claims were rare in the colony. Passenger traffic had yet to become the commercial powerhouse it would become under the British, and passenger claims are absent. Prize and reprisal claims were numerous, but only during the last two or three years of the French regime. The Seven Years War was then underway, and British vessels were taken on the Atlantic Ocean and the River St. Lawrence. Prior to that war, the battles fought in New France were more often with the natives, and not along the formal rules of European warfare. The Quebec court would never attain the frequency of prize cases that the Halifax Vice-Admiralty Court would later reach, given its strategic position in the British wars with the French

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796 Ordonnance of 1681, *supra*, note 268, Book I, Title II, art. 2. In the Ordonnance of 1681, Title V of Book III concerns loans *à la grosse aventure*, which were similar to loans under bottomry bonds or repondentia. Excessive interest rates were allowed on such loans considering the risk of losing everything should the ship be lost at sea. These loans were abolished in France by Loi n° 69-8 du 3 janvier 1969.

797 *Ibid*., art. 3.

798 *Ibid*., arts. 4-7.

799 *Ibid*., arts. 5 and 10. Note that the benefit of prize was, at least in theory, reserved for the Admiral of France. See the text accompanying note 680 above.

800 *Ibid*., art. 9.

801 *Ibid*., arts. 3 and 8.

and the Americans.[802] By comparison, the Halifax vice-Admiralty Court heard more than 1,000 prize cases between 1793 and 1815.[803]

[802] LAC holds 137 volumes of Halifax prize materials. All prize materials date from 1793 to 1815, but the majority concern the War of 1812; there are 261 prize cases from 1813 and 163 from 1814. Volumes 116 to 119 contain 21 prize appeal cases, volumes 120 to 127 contain 56 prizes condemned to the Crown *jure corone*, for ships captured prior to the October 13, 1812 Order in Council declaring general reprisals against United States shipping. Volumes 130 to 138 contain 120 cases of ships recaptured from the enemy which, during the War of 1812, was the United States, and volumes 139 and 140 contain 32 grants of letters of marque and reprisals. Letters of marque and reprisals allowed the holder to capture enemy ships and goods to be brought back to Nova Scotia for adjudication. The letters also require the holder to advise the Crown of enemy positions, strengths and weaknesses as such intelligence became available. The files concerning letters of marque and reprisals usually do not contain formal letters or warrants, but rather the commission issued by Sir John Coape Sherbrooke, the lieutenant-governor of Nova Scotia, addressed to Alexander Croke, LL.D., judge of the Halifax Vice-Admiralty Court, commanding letters of marque and reprisals to be issued. The commission is usually hand-written and sealed, but a printed form was also used. Both referred to the royal commission issued by the king to the Lords Commissioners of the Admiralty, whereby they could empower persons such as the lieutenant-governor to command the vice-admiralty judge to issue letters. Each commission of the lieutenant-governor identifies the person and the ship to whom letters were to be issued. Letters of marque and reprisals were only issued once security had been provided by the recipient. The letters, in the form of a warrant under seal issued by the judge of the vice-admiralty, required the recipient to keep a journal of his captures and to bring them to a court of admiralty to be adjudged. The letters also call upon all allies of the king to lend assistance to the bearer in his endeavours. A commission of the lieutenant-governor appears in virtually all 32 grants found in the files held by LAC, but the warrant of the vice-admiralty court constituting letters of marque appears only rarely. Probably the warrants were left on board the vessel and a copy was not filed. Some countries actually issued a formal printed document entitled Letters of Marque but none appear in the Halifax files where letters were requested, and certainly the warrant of the court stating that "Know ye therefore that We do by these presents issue forth and grant Letters of Marque and Reprisals to and do license and authorize the said *recipient* to set forth in a warlike manner..." would constitute sufficient authority. For prize cases, the Halifax registers refer not only to prize case files proper, but to letters of marque issued, to ships recaptured, to prize appeals and to *jure corone* cases. These categories correspond to those in the LAC collection. However, the numbers of ships referred to vary slightly. The LAC collection contains 56 *jure corone* cases, whereas the Halifax document lists 58. The LAC collection contains files for 120 recaptured ships whereas the Halifax document lists 125. There are 32 letter of marque files in the LAC collection, whereas there are two separate but identical lists of letter of marque cases in the Halifax document, each referring to 46 cases. The LAC collection contains 21 prize appeal files whereas the Halifax document lists 42. The Halifax list includes the appeals in the LAC collection, and many more that are not indexed in the LAC collection. However, even these differences may have more to do with the arrangement of case files than with lost documents. The Halifax list of prize, *jure corone*, recapture, letter of marque and prize appeal cases corresponds to those case files in the LAC collection. A prize file can include letters of marque and appeal documentation for example. The comparison of ships in the Halifax lists to those in the LAC index of ships reveals only a few differences. It is clear that the entire collection of prize-related files on the Halifax lists is today in the LAC collection. As concerns prize case files in the LAC collection, there are 114 volumes containing 817 running from 1793 to 1815, an average of more than 35 each year. Here, file numbers can be of assistance as the Halifax lists include the original file numbers. For prize cases, these run from number 1 in 1793 to number 291 in April 1812. To these 291 must be added 66 lettered file numbers inserted between numbered files as well as some numbers used twice. The sequence then appears to restart at page 56 of RG1 378 with number 1 in July 1812 climbing to number 702 in 1815, with one additional unnumbered 1815 case. In total there are about 1,060 prize files listed, but these include prize cases proper as well as recaptures, and prize appeals. An additional list in the Halifax lists contains 46 letter of marque cases which have no file numbers. Other file numbers are missing on the Halifax lists. A comparison of ship names reveals the correlation between the Halifax lists and the LAC collection with the exception of a few ship names. These differences might be due to erroneously referring to the capturing vessel instead of the prize.

Some heads of jurisdiction were the source of numerous judgments in Quebec. Disputes over wages due to mariners is an obvious example.[804] However, the power of the court to determine disputes between co-owners over the possession and use of the vessel through the sale of the vessel was invoked even more frequently.[805] Fisheries disputes were equally common,[806] as were cases before the admiralty court where the dispute is referred to arbitrators.[807] These disputes illustrate the importance of arbitration in French maritime law. The Ordonnance of 1681 provided for arbitration in marine insurance disputes,[808] but arbitration was also common in commercial maritime disputes. It remained so following the arrival of the British, and it has been argued that the difficulty of comprehending English law led many French Canadians to resort to arbitration.[809]

The Sale of Goods

One head of jurisdiction that appears frequently in the registers of hearings is that over the sale of goods carried or to be carried by ship. English admiralty jurisdiction could include the loss of, or damage to cargoes carried by sea, although claims for cargoes or portions of cargoes lost during loading or discharging could be contested by prohibition prior to 1861. But where short landing resulted from short loading, the ship could not be held to blame, unless the bills of lading

It is again virtually certain that the 817 files in the LAC prize case file collection are included in the 1060 cases referred to in the Halifax list.

803 The total number of prize-related case files on the Halifax lists is approximately 1,100, slightly more than the 1,046 prize-related files in the LAC collection. But the difference may be due to numbers being skipped in Halifax or to files being combined for common prizes, as the Halifax lists include ship names not found in the LAC collection. It can nevertheless be concluded that virtually all prize case files listed in 1881 are now in Gatineau. From the Halifax lists and registers it can be seen that the wars with France and the United States brought to light the enviable geographic position of Halifax and the enactment of the *Prize Act*, 1801 (U.K.), 41 Geo. III, c. 96, brought numerous prize cases to the court. It is unlikely that new Halifax registers or Minute Books, Warrant Books or Action Books will be found, but the existing records allow us to conclude that the wars were essential for the work of the Halifax Vice-Admiralty Court. Select Halifax prize cases are reported by James Stewart, *Reports of Cases in the Halifax Vice-Admiralty Court* (London: Butterworths, 1814) and in volume 3 of Walter E. Lear, *Canadian Reports: Appeal Cases 1807 – 1913* (Toronto: Carswell, 1910-16).

804 There are more than 60 entries in the three extant registers of hearings, in which mariners claim their wages.

805 There are 94 entries in the registers of disputes leading to the sale by auction of the disputed property, all but a few of which were initiated by a co-owner.

806 There are 42 entries in the registers of fisheries disputes.

807 There are 33 entries involving referrals to arbitrators.

808 Ordonnance of 1681, *supra*, note 268, Book III, Title VI, art. 72.

809 See, for example André Morel, "Les réactions des Canadiens devant l'administration de la justice de 1764 à 1774" (1960) 20 *R. Barreau* 53. However, this theory is contested, and English law may at any rate not have been applied between 1764 and 1774 quite as rigourously as was once thought. See *supra*, note 443. And see Arnaud Decrois, Michel Morin and David Gillies, *Les Tribunaux d'arbitrage en Nouvelle France et au Québec de 1740 à 1784* (Montreal: Thémis, 2012), and Philip Girard, Jim Phillips and R. Blake Brown, *A History of Law in Canada* (Toronto: Osgoode Society Publications, 2018), vol. 1 at page 334.

erroneously stated that the missing cargo had been loaded, in which case the claim was considered to be a claim for loss at sea. These goods were invariably shipped from a seller to a buyer, and early English admiralty desisions concerned sale of goods disputes, but the common law courts soon construed contracts of sale of goods to have been made on land, and thus to be beyond the jurisdiction of the English admiralty courts.[810]

The Ordonnance of 1681 makes no mention of claims involving the sale of goods by name, but confers jurisdiction over "*tous contrats concernant la commerce de mer*", which words are capable of a very wide interpretation. From the registers of hearings, it becomes clear that where goods were to be delivered by ship, the court considered it had jurisdiction to hear a claim for unmerchantable quality or for short landing, or even for short loading, where there was no evidence that the subject goods had ever been shipped. Thus the claim of a buyer whose cargo is not on board, and may never have been loaded, could sue the seller in the admiralty court on the contract of sale.

The French were meticulous in the supervising of the loading and discharging of cargoes. There were official on-board checkers or *gardes à bord*, as well as checkers on shore called *gardes du domaine* at each principal load and discharge port. Where the goods were loaded, but not discharged, or discharged damaged, the court clearly had jurisdiction, but such claims would be against the shipowner for loss or damage during carriage, much as would a similar claim in the English admiralty courts. Where the French court went further, was in exercising jurisdiction even where the goods sold were not loaded, or where their inferior quality was not due to faulty carriage.

The extended jurisdiction of the Quebec admiralty judges over disputes arising over contracts for the sale of goods may be related to the fact that the jurisdiction conferred on the admiralty court by the Règlement of 1717 was previously exercised by the Prévôté. However, the jurisdiction of the admiralty judges was to be exclusive, and the Règlement of 1717 conferred jurisdiction on the Quebec admiralty court, thereby giving effect to the Ordonnance of 1681.

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[810] The remedy was thus a writ of prohibition from one of the royal courts. See *Hale and Fleetwood*, *supra*, note 41, at pages 281 *et seq*., reproducing an extract of Pepys MS 2872 in Magdalen College Cambridge. The manuscript reproduces a sampling of prohibitions issued during the first decade of the seventeenth century, including cases where territoriality is argued to counter the court's jurisdiction over foreign contracts, presumably including contracts of sale of goods to be shipped to England.

Cases concerning the sale of goods carried or intended to be carried by ship abound in the existing admiralty court registers of hearings, even when one excludes cases found in the first portion of the second register. That portion contains more than 60 cases decided by Daine between 1749 and 1752, the majority of which concern general civil matters, including sale of goods disputes.[811] However, the admiralty court proper might have heard as many sale of goods cases as the Prévôté. References to sales contracts and judgments on sales contracts are common in the entries found in all three extant registers of hearings.

An entry dated September 9, 1740, indicates that the admiralty court heard a case between one Huard, lieutenant in the navy of New France, and Jean-Baptiste Larchevêque. Huard claims that on November 3, 1739, he purchased from Larchevêque, a resident of Petite Rivière St-Charles, 200 barrels of flour and 700 barrels of biscuit for the sum of 5,594 French pounds, which were never delivered. The admiralty court, presided over by Boucault, issues a specific performance order, enjoining Larchevêque to perform by delivering the goods. Larchevêque appeals to the Conseil supérieur, but the appeal is rejected. He then fulfills the order, at least partly, as on July 12, 1741, Larchevêque requests the appointment of arbitrators by the admiralty court in order to evaluate the value of the biscuit finally delivered. A month later, on August 9, Larchevêque seeks the homologation of the arbitral sentence, but the final award is against Larchevêque, ordering him to pay 559 pounds in damages to Huard.[812]

In an entry dated September 5, 1742, Boucault renders another judgment in a sale of goods case involving Jacques Pereault, a Quebec businessman, and François Havy and Jean Lefebvre, also carrying on business in Quebec. Pereault seeks a refund of the price of 300 pounds of rope purchased from Havy and Lefebvre, who, in turn, had purchased the rope from Pierre Chalou, a Quebec baker. Chalou argues that he had sold the line to Havy and Lefebvre as is where is, and cannot now be asked to vouch for its fitness for purpose. Being unable to fulfil the seller's obligations to the buyer, the sale to Pereault is found to be void, and Havy and Lefebvre are ordered to refund the purchase price.

811 See the text accompanying note 708 above.
812 The final judgment was rendered on September 2, 1741.

But the Quebec admiralty court was also involved in the sale of vessels. All admiralty courts can be asked to sell vessels in *in rem* actions, and even from time to time in execution of *in personam* judgments, and the Quebec admiralty court used its process to sell ships or parts of ships in execution of judgments and from time to time as an interlocutory measure where the ship was found to be perishable, even though the action was taken solely against the shipowner. However, the court also often acted as an auction house, especially where co-owners were unable to agree on the use and possession of their ship.

An example of sale to prevent the depreciation of a ship is found in an entry dated November 15, 1741, where the court orders the sale of the *Saint-Michel*, a vessel that was apparently used under a fisheries grant at Lac St-Augustin. The *Saint-Michel* first appears in the registers of hearings on October 22, 1740, as belonging to Henri Le Breton. The sale ordered the following year makes no mention of Le Breton, and concerns a dispute over fisheries revenues between David Turpin, a Quebec businessman representing Pierre LeVieux & Cie of Rouen France, and Michel Pétrimoulx, another Quebec businessman.

The court is informed that the *Saint-Michel* is in poor condition at the Cul-de-Sac wharf in Quebec City, and orders its sale. The auction takes place over three days, ending on December 1, 1741, with the sale of the ship to Jean-Paul Taché for the sum of only 162 French pounds. The court orders the sum paid into court and the litigation continues. The register does not reveal the outcome of the litigation, but on May 23, 1742 the *Saint-Michel* is back in the register, this time in a charter-party dispute. By then, the record indicates that the owner of the ship is Michel Mahier.

An example of the sale of a portion of a ship is illustrated in the case between Pierre Lestrefil, a resident of Chambly, and Joseph Alary, a ship's captain. Lestrefil had sold three masts to Alary for a vessel or vessels that are not mentioned in the register, and claims the price thereof. On October 8, 1750, Daine, sitting as an admiralty judge in Guillemin's absence, orders the masts to be appraised by assessors to be appointed by the parties. Étienne Corbin and Jean-Baptiste Levitré are appointed as assessors. Their report is to be filed before the court and the masts are to be sold if Alary does not pay the assessed value.

There are many cases in the registers of hearings where the sale of a vessel is in execution of a judgment obtained against its owners. But the most common circumstance leading to the sale of a vessel by the Quebec court is where the co-owners of the vessel seek the sale thereof. The registers of hearings are full of examples. In these cases, the court does not appear to be operating in execution, as no judgment is referred to, and often no amount of money appears to be due to one party or the other. Rather, the co-owners are unable to agree on the possession, use or earning capacity of the vessel and seek its sale.

An early example in the extant registers is that of the schooner *Madeleine*, owned in equal shares by Michel Privé and Charles Turgeon. The owners are unable to agree on the fishery earnings of the ship and Privé thus turns to the court for an order of accounting. On October 7, 1739 the court orders Turgeon to prepare a full accounting of earnings. On July 29, 1740 Privé appears before the court seeking an order enjoining Turgeon to comply, or face *contrainte par corps*. Alternatively, Privé seeks an order for the sale of the vessel and offers 300 French pounds for Turgeon's half. Boucault notes that Turgeon is agreeable to accounting for the earnings of the vessel in 1739, if Privé will be ordered to do the same for 1738. The parties then refer the matter to arbitration and the register is silent as to the eventual outcome.

In the case of the sale of a vessel, the manner of sale is by auction by the court. The court's main registry office was in the courthouse on St. Louis Street in the upper town of Quebec City. However, the court also had a registry office in the old port area on the Cul-de-sac wharf. Vessels to be auctioned were brought to or near the wharf. Throughout the period from 1740 to 1750, according to the extant registers, auctions took place in the Cul-de-sac registry office, close to the vessel being sold. However, from the beginning of the 1750s, auctions took place in a private home. The home, on the Cul-de-sac wharf, is referred to in the registers as belonging to the widow LaCoudray.

The widow was in fact Catherine Gautier, who had been married to Jean-Baptiste LaCoudray, dit Tourangeau. Their daughter, Marie-Anne LaCoudray was married to Jean-Claude Louet, who happened to be a notary and the registrar of the court of admiralty. In 1756, the widow LaCoudray declares to have been living with the couple for eight years and thus the house would

be that of the admiralty registrar.[813] The registers do not explain whether the Cul-de-sac registry office was moved into the registrar's home, whether the registrar bought the building where the registry was situated, or whether it was simply more comfortable to hold the auctions in a nearby house, but all auctions during the 1750s took place there.

The method of auction was for the most part in conformity with the provisions of Title XIV of Book I of the Ordonnance of 1681. Auctions were held over three days. The Ordonnance of 1681 stated that for ships, the three days would be consecutive Sundays, following mass, but in Quebec, the court held auctions on any court day, that is any day of the week except Sunday.[814] The procedure required notices to be posted on the mast of the ship to be sold, on the door of the upper town and lower town churches and at the admiralty court registry.

At the beginning of each session, the sale would be announced by the admiralty bailiff, in his role as court crier. The bailiff would announce the starting price at the first session and at the beginning of the following sessions would announce the highest bid received at the previous session. All of these steps are in the Ordonnance of 1681. In Quebec, the auctions were held in the afternoon starting at 14:00 hours and terminating at 17:00. The highest bidder at the final session would be retained, subject to his paying the price and the court costs.[815] Failure to pay resulted in a *folle enchère* and the vessel would be sold again. The defaulting bidder would be subject to *contrainte par corps*.[816]

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813 See Nancy Christie and Michael Gauvreau, eds., *Mapping the Margins : The Family and Social Discipline in Canada, 1700-1975* (Montreal: McGill-Queens Press, 2004), paragraph 115 at page 67. Louet was third in a line of royal notaries. See J. Edmond Roy, *Histoire du Notariat au Canada* (Lévis: Revue du Notariat, 1899), vol. 1 at page 352.

814 See the Ordonance of 1681, *supra*, note 268, Book I, Title XIV, art. 4. However, article 9 allowed the admiralty courts to auction small boats of less than 10 tons deadweight at any three court sessions, as long as at least eight clear days passed between the first session and adjudication. It is this rule that was followed in Quebec, even though the tonnage of the vessels sold ranged from 15 to 192 tons deadweight. In only one case in the registers, that of the sale of the perhaps appropriately named *Infortune* by its owners, Eustache Lonchamps and Pierre Lavigueur on September 21, 1754, was the tonnage said to be less than 10 tons deadweight. The eight ton *Infortune* sold for 70 French pounds. The largest vessel sold, at 192 tons deadweight, was the *Brittannia*, captured from the British by Pierre-Anne-Marie Dechalleaubriaut, master of the *Virginie*, and sold to a Mr. Lefebvre for 6,500 French pounds on August 23, 1758.

815 Court costs in the registers range from 68 French pounds for the sale of *Saint-Michel* to Jean-Pascal Taché for 162 pounds on December 1, 1741, to 127 French pounds for the sale of the *Loup Marin*, along with the rigging of the *Espérance*, apparently on board of the *Loup Marin*, to Volant de Hautbourg at 3,020 pounds on April 24, 1754. For more on the *Saint-Michel* see the text accompanying note 812 above.

816 See the Ordonnance of 1681, *supra*, note 268, Book I, Title XIV, art. 10.

The Ordonnance of 1681 allows the court to hold one or two additional auction sessions and the practice was to hold a total of four or, in two cases,[817] five sessions, where the bids at the third session were insufficient. At the final session, at 17:00 hours, a candle would be lit. The candle burned for approximately 30 minutes and the highest bid at the time the candle burned out would be successful.[818] The sale by the admiralty court would be free and clear of all liens and mortgages,[819] and the sum paid into court would be paid out according to the ranking of the various claims, including, for the sale of a new ship not having yet sailed, the first priority of the builders.[820]

In addition to the jurisdiction of the Quebec admiralty court over the building, fitting out, supplying, repairing and selling of ships, and even of the goods carried on ships, the court had jurisdiction over life on board ship. However, claims in damages for assault and battery on board ship were rare in the Quebec admiralty court. These claims were common in the British merchant marine as shall be seen. There is only one entry, in the extant registers of judgments following hearings, where physical violence is clearly alleged against the master of a ship. It took place in the summer of 1740 on board the *Saint-Jean*. According to the complaint of Bonaventure Gagnon, the master of the *Saint-Jean*, Captain Charles Lecour, treated him with violence.[821]

Gagnon was probably a crew member on the *Saint-Jean*, but, during the 1740 season, he worked at the fishery at Gros-Mécantina on the lower north shore of the River St. Lawrence. He claims damages for violence, presumably on board the *Saint-Jean*, in the sum of 500 French pounds. On August 11, 1740, Boucault, the admiralty judge, grants Gagnon the 500 French pounds claimed in damages, but sets that sum off against a larger sum owed to Lecours by Gagnon for fishing services.[822] No other entry makes reference to physical mistreatment by masters or seamen.

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817 The sale of the *Brittannia*, *supra*, note 814, was at the fifth session, as was that of the *Félicité*, sold to one Larché for 8,000 French pounds on June 26, 1754.

818 A similar practice in English court auctions was called an auction by inch of candle.

819 See the Ordonnance of 1681, *supra*, note 268, Book I, Title XIV, art. 1.

820 *Ibid*., art.17.

821 Charles Lecour is referred to in the registers as being the master of another ship working the fishery at Gros-Mécantina. There are several entries in 1742 where Lecour, then master of the *Louise*, is sued by Guillaume Estèbe, a councillor on the Conseil supérieur, and a participant in the fishery. On September 1, 1742, Boucault orders Lecour to act as a *bon père de famille* in his dealings with the buildings and equipment of the fishery.

822 The sums Gagnon owed to Lecour might have been for fitting out the *Saint-Jean*. On the same day Gagnon is successful, another claimant, Augustin Grenier, the chief officer of the *Saint-Jean*, claims 45 French pounds for

The admiralty court in New France also heard cases where royal rights or droits of admiralty were claimed in the name of the receiver general on behalf of the admiral of New France.[823] These claims are related to amounts due to the admiral, for fisheries licences, offences of having left port without permission, prize taken from the enemy and, most often, for the finding of shipwreck or whales or other large fish on the shores of the colony. The profit of the sale of the oil and whale bone was to be apportioned, with a portion, usually one third, paid to the admiral, another third to the king and the remaining third to the finder. Where the finder did not report the finding, he would be the object of a suit.[824]

Seizures before Judgment and Interlocutory Remedies

For present purposes, the most important entries in the registers of hearings involve the process of seizures, and especially interlocutory seizures before judgment. As noted above,[825] the Ordonnance of 1667 contained a title on seizure and referred to *contrainte par corps*, or the arrest of debtors, but these remedies were traditionally only available in execution of judgments or according to local custom in certain cities. The Ordonnance of 1673 extended *contrainte par corps* to execution of judgments on marine claims. Similarly, the Ordonnance of 1681 included Title XIV of Book I on the seizure and sale of ships and vessels.

But those provisions had all to do with process and priorities, because a sale by auction of an admiralty court conferred title to the successful bidder free and clear of any former hypothec, mortgage, privilege or lien.[826] None of these ordonnances mentioned seizure as an interlocutory measure, except as a preventive measure where the ship in dispute would be perishable.

each worker at Gros-Mécantina, alleging the expenses charged by Lecours for fitting out the vessel to be exaggerated. Boucault finds for Lecours, dismissing the claim for compensation.

823 The receiver was appointed by the Ordonnance of 1681, *supra* note 268, Book I, Title VI.

824 An example can be found in the entry of September 24, 1740, wherein Boucault orders the profit earned by François-Étienne Cugnet to be so apportioned. However, Cugnet was not included in the apportionment as another man, Jean-Baptiste Dorval Desgroseillers, actually found the beached whale on the shores of Manicouagan. An appeal to the Conseil supérieur was successful on October 3, 1740, only a few days following Boucault's ruling, although concerning the values, the apportionment in thirds was upheld. See Conseil supérieur, register 54, folio 123v, BAnQ reference TP1, S28, P19017.

825 See the text accompanying note 260 above.

826 Ordonnance of 1681, *supra*, note 268, Book I, Title XVI, art. 1. The use of civil and common law terms to translate *hypothèque* and *privilège* is probably appropriate, given the warning of Valin. See note 269 above.

But this is not to say that seizure before judgment was unknown in France. As noted above,[827] simple seizures, distraint and foreign attachments were available under the Custom of Paris in limited cases, one of which was where a commercial claim was based on a bill of exchange. Simple seizure would eventually become *saisie conservatoire* and be made of general application in 1955 but, even then, only in situations of urgency.

That said, the remedy of the interlocutory seizure of goods remained available as part of the customary law in certain traditional mercantile law disputes. It would require the review of the records of the Court of Prévôté to see whether, and how often, seizures were obtained in civil law disputes in Quebec under the French regime.[828] The remedy of seizure in execution of judgments, codified in the Ordonnance of 1667, was applicable in Quebec and contemporaneous with the creation of the civil law courts in Quebec City, and must have been a common remedy in real and personal property disputes.[829] But interlocutory seizures before judgment were another matter.

Whatever the frequency of seizures before judgment in the Prévôté, the Quebec admiralty registers confirm the procedure was well-known in maritime law disputes. It would be an exaggeration to say that seizures before judgment were every-day remedies in French admiralty law, but there are many examples of seizures before and after judgment in the registers of hearings, whether the seizure is in the hands of the opposing party or by garnishment of a third party.

The registers of hearings are the most important with regard to applicable law and procedure, but do not contain the entire record of seizures issued. Several entries refer to a seizure having been issued on a previous date, even though no entry for that date appears in the registers of hearings. As stated above, there were registers of judgments rendered without a hearing, and the issuing of seizures might have appeared there, although the Ordonnance of 1681 was silent as to the precise content of such registers, and none have survived for the Quebec court. The references in the extant registers confirm that obtaining a seizure before judgment required the fiat of the

827 See the text accompanying note 271 above.

828 As pointed out above, there are 109 registers of prévôté hearings, running from 1667 to 1759, BAnQ reference TL1, S11, SS1. See the text accompanying note 726 above.

829 Prévôté register volume 87 entitled "Registre des saisies réelles" covers real property seizures in execution from 1744 to 1759. The register contains 75 folio pages. No other prévôté register is dedicated to seizures.

admiralty court, but only where the seizure was contested would an entry appear in the registers of hearings.

Seizures following final judgments were probably only rarely contested, but seizures before judgment would appear to be more contentious. It is impossible to know how many were issued, and the number can only be surmised to be more than those entered in the registers of hearings. The court rarely refers to the seizure as *conservatoire* or before judgment, and the nature of the seizure must be gleaned from the state of the proceedings. Reference to a few entries will illustrate the practice.

In an entry dated July 30, 1740, at the beginning of the first extant register of hearings, Louise Savaria, known as the widow Fisque, produces in court, on behalf of her seafaring son Charles Fisque, a letter written by the defendant, Pierre Hyon, master of the *Saint-Pierre*. She seeks validation of a seizure by garnishment effected on one Rotot, co-owner of the *Saint-Pierre*, for wages claimed by her son. The request is granted.

On November 5, 1740, Marc-Antoine Huard is heard in a suit taken against Étienne Gagné. Gagné is a ship builder and repaired the *Saint-Claire*, belonging to Huard. Huard owes money to Gagné for the repairs, and the dispute concerns the steps taken by Gagné to prevent the ship from sailing. It is not clear from the record, but would appear that Gagné had not only repaired the ship, but also loaded the ship with lumber, and that he obtained a seizure before judgment to prevent the ship from sailing. The week previous, on October 29, 1740, Gagné had obtained two defaults against Huard, one for the repairs and another for loading the ship with lumber. He had garnished sums owed to Huard, and probably seized the ship and lumber as well. The court orders Huard to file the disputed amount in the registry but, unfortunately, the register ends there and the outcome of the suit is unclear.

In another case heard on July 12, 1741, the court refers specifically to a *saisie conservatoire* or conservatory seizure, in a suit where both parties seize before judgment the assets of the other. The suit involved complex and lengthy litigation between two groups of French merchants doing business in the colony. The claimant, Jean-Étienne Jayat Larché, a Parisian merchant, obtains a seizure before judgment of the sum of 39,496 French pounds owed to the defendant, Pierre LeVieux & Cie, merchants of Rouen, by garnishing both Jean-Baptiste Hivert, master of the

vessel *Saint-François*, and the former Quebec agents of Pierre LeVieux & Cie, Jean Dumont and Jean-Urbain Martel de Belleville, co-owners of the vessel *La Providence*.[830]

It is unclear whether the claimant's suit was taken in the admiralty due to the ship-owning aspect of the garnishees, or due to the large jurisdiction of the court over goods sold and delivered by ship. At any rate, not to be outdone, the former agents seize sums before judgment by garnishment in the hands of David Turpin, the new agent of Pierre LeVieux & Cie A few days later, on July 15, the court orders Dumont to produce to Turpin the books of the former agency, to demonstrate that certain bills of exchange were in fact issued on behalf of Pierre LeVieux & Cie.

These entries in the admiralty registers of hearings are not the sole references to seizures before judgment, but contain the sole references to *saisies conservatoires* by that name. Jean Dumont would have issued bills of exchange on the credit of Pierre LeVieux & Cie, and David Turpin contests that the bills were issued for goods belonging to his new principal. On May 2, 1742, David Turpin requests that the matter be referred to arbitrators "as is the custom in this colony", but the court notes that the parties have opted for litigation and the matter continues before the courts.[831]

Seizures before judgment could be of sums of money, or of any other personal property, including the ship that was the object of the dispute. In a suit concerning the construction of the ship *Heureuse Marie*, the building was financed by Pierre Trottier Désaunier, a Quebec businessman, and the vessel was later put into service by the new owner, Michel Sallaberry. By the time Sallaberry had missed a payment, the *Heureuse Marie* was loaded with a cargo. The register does not explain who the owner of the cargo may have been, but it was presumably Sallaberry, as the admiralty judge Boucault states that Désaunier had also financed the purchase

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830 The vessel *La Providence* and its owners, who include Gabriel Côté, appear again in the registers in unrelated litigation for the payment of repairs on September 2, 1741,

831 This dispute continues to appear regularly in the admiralty registers of hearings and the Conseil supérieur registers, involving additional seizures before judgment and finally terminating in the admiralty registers, with a judgment dated September 13, 1742, declaring all of the seizures valid. The decision is appealed, but the appeal is dismissed on September 19, 1742. See Conseil supérieur register 58 at folios 14-17, BAnQ reference TP1, S28, P19307. The matter is then returned to the Prévôté for a hearing on the merits, thus explaining the absence of further entries in the admiralty register. The decision of the Prévôté issued on May 23, 1743 is again appealed and Dumont is eventually at least partially successful. See Conseil supérieur register 59 at folios 108-109, BAnQ reference TP1, S28, P19531.

of the cargo, and grants the seizure of both the *Heureuse Marie* and her cargo. For good measure, the court orders Sallaberry to pay 1,500 French pounds to Désaunier by way of damages, along with the other sums owed, and to turn over the insurance policy Sallaberry holds on another ship, presumably as further security.[832] The register is silent as to whether and when the sums were repaid.

Seizures could concern disputes over ships or their cargoes. In a claim by Quebec merchant Louis Fornel for goods delivered, it is alleged that the defendant, one Hurette, described as an employee of the fisheries at Baie des Châteaux, would have omitted to deliver a quantity of tobacco to the claimant. Fornel alleges that Hurette has no fixed address and seizes before judgment, by way of garnishment, 92 French pounds in the hands of a certain Gressette. Gressette contests the seizure but is ordered by the court on September 1, 1742 to file a declaration of what sums, if any, he owes to Hurette.

It is not clear what importance the absence of an address for Hurette may have had, but presumably it was an explanation as to why Hurette was not personally served. Four days later, on September 5, Boucault releases Gressette from the seizure, finding that Gressette owes nothing to Hurette, and orders Hurette to pay 59 French pounds to Fornel as payment of goods purchased from Fornel. Presumably, the tobacco was to be provided in payment of sums owed by Hurette to Fornel for goods sold to Hurette. But the register says nothing further of the dispute.

By the end of the 1740s, seizures before judgment had become more common in the Quebec admiralty court. An entry dated September 27, 1749 confirms that Daine heard the claim in admiralty of François Chaumont, a resident of Montreal, against Pierre Révol, a well-known Quebec merchant, and François Larue de la Pépinière, a ship's captain, for debts resulting from contracts for the sale and delivery of goods. Chaumont seizes before judgment goods belonging to Révol, although probably not the goods that were the object of the dispute, and seizes sums before judgment, by garnishment, in the hands of another Quebec merchant, Pierre Clavery. The

[832] The other ship is said to be the *Saint-Michel*, although this may be an error, as Sallaberry was described in the register of hearings as the owner of the *Fidel*, and the *Saint-Michel*, as seen above, had been sold by court auction to Jean-Paul Taché on December 1, 1741 and appears again in the register as belonging to Michel Mahier on May 23, 1742.

seizures are not contested, at least on that date, and although the other parties are present, Révol is absent, and is condemned to pay costs for his default.

In another entry dated June 13, 1750, the admiralty court hears the motion of Jean-Baptiste Macarthy, a mariner, in opposition to a seizure obtained by Henri Arnault, a local upholsterer. The claim concerns a cargo of sugar, lard and a barrel of maple syrup which had been seized before judgment by Arnault in a related dispute against Jean Adam dit Lafontaine. Macarthy attempts to have the seizure by Arnault quashed, presumably due to his claim to the seized goods, but Daine, still presiding over the admiralty court, upholds the seizure and dismisses Macarthy's motion.[833]

Seizures before judgment could be of the assets of the defendant, or by garnishment of assets or sums of money owed to the defendant by third parties. However, they could also be seizures in revendication where the claimant sought to arrest property over which he held the best title. This includes the remedy of stoppage in transit of goods sold but not paid for. An example appears in an entry in the register of hearings dated August 26, 1750.

A French merchant of La Rochelle, Denis Goguet, claims to have shipped goods to Nicolas-Auguste Guillet de Chaumont, a Quebec notary and Jacques Barsalon, a Quebec merchant. The sale price of 23,285 French pounds was clearly unpaid, and the goods were seized in the hands of Barsalon. It is unclear in the register who is the ultimate buyer of the goods, but it is likely Chaumont or his client, as Daine orders the notary to pay the sum to Goguet. In order to pay the debt, Daine finds the seizure before judgment to be valid and orders the goods to be sold by a merchant chosen by the parties or, failing agreement, by the court.

Under the stewardship of Guillaume Guillemin, the admiralty court continued to hear suits involving seizures before judgment until the arrival of the British. Seizures before judgment were particularly common during the middle years of the 1750s. In an entry dated February 6, 1754, Guillemin upholds the seizure before judgment by garnishment of a quantity of cod in the hands of Augustin Galarneau in Cap Rouge. The seizure was obtained by Joseph Chabot, a Quebec mariner, in a claim against Jean Marié and Pierre Provost for the fish in question.

[833] Guillaume Guillemin had been appointed admiralty lieutenant on June 3, 1750, but only appears in the registers as from 1752. See the text accompanying note 707 above.

A similar suit in June of 1754 concerns a claim by Jean-Pascal Taché, a Quebec merchant and shipowner[834] against Jacques Bellecour de la Fontaine, the king's attorney before the Conseil supérieur, and Gilles Stroud, de la Fontaine's partner in two fishery enterprises in Montagamion and Chicataka. The claim is for a debt owed to Taché pursuant to a judgment obtained on September 22, 1753. The decision is not in the registers, possibly due to a gap between the first and second portions of the third register of hearings.[835] Taché had at any rate obtained the seizure before judgment in garnishment of whale oil and seal skins belonging to de la Fontaine in the possession of Stroud. Now with a judgment in hand, Taché seeks an affirmative declaration by Stroud and the sale of these items by the court.

But Taché is not the only creditor of de la Fontaine. Messrs. Havy and Lefebvre, Quebec merchants, as well as one Garrison, a wine merchant in Bordeaux, produce their judgments obtained against de la Fontine before the Court of Prévôté in August and October 1753. Given the authority of these decisions, Guillemin validates the seizure before judgment, now in execution, and orders the defendant parties to produce accounts of the items sold and to be sold. The registers are silent as to any priority dispute between the creditors for what might become an insufficient fund to pay all judgments.

A decision entered on July 18, 1754 between Pierre Révol, a well-known Quebec businessman, and Charles Turgeon, master of the *Saint-Louis*, involves a seizure before judgment of a cargo of approximately 200 bushels or *minots* of grain and peas and of sums of money produced by Turgeon's sale of 280 other bushels. Révol alleges having bought 700 bushels from the parish priest of Berthier and having sent Turgeon to load the cargo. Turgeon replies that the priest denied any arrangement with Révol and, instead, loaded 480 bushels on the *Saint-Louis* for Turgeon to sell on his way up river to Quebec City. Turgeon was to receive a small percentage of the sales price as freight.

Turgeon does not contest Révol's seizure, as long as he is paid the freight on the 480 bushels. Turgeon also seeks to reserve his right to counterclaim against Révol for deadfreight or *faux fret*, the difference between the freight earned on the 480 bushels and the freight promised on the 700

[834] Taché purchased the *Saint-Michel* in 1741. See note 815 above. His name also frequently appears in the admiralty registers, not only as a party, but acting as proctor for himself or other parties.

[835] See the text accompanying note 705 above. The judgment may also have been obtained without a hearing.

bushels. The admiralty court does not take lightly to the double pleading, and dismisses Turgeon's right to claim deadfreight. However, Turgeon is ordered to deliver the seized bushels to Révol, upon payment of the freight for the full 480 bushels. As for the sales price of the 280 bushels sold by Turgeon, the parish priest appears to have come to terms with Révol, by agreeing that 400 French pounds would be paid in compensation. No further entry for this dispute appears in the registers.

Wages could be a prime target for seizures before judgment by way of garnishment. In an entry dated August 24, 1754, Guillemin declares valid the seizure of the wages to be paid to Renaud Daguet, a mariner, by Marie-Thérèse Grenet, widow of Marc Bouchette, in a claim, the nature of which is not clearly established in the register entry. Instead, the debate concerns the seizure before judgment of wages. The garnishee, Joseph Cadet, a Quebec butcher, confirms having sent Daguet to pick up a cargo, but alleges having already paid a portion of the promised wage. The court orders Cadet to hold the remaining sums until final determination of the widow's claim, but no further mention appears in the registers.

Suits could involve multiple seizures before judgment. On October 16, 1754, the court heard a case wherein Marie-Charlotte Laroche seized before judgment sums in the hands of the defendant, Louis Barthélemy, and sums owed to him as wages by the garnishee, Étienne Charest.[836] Charest admits owing the seized sums to Barthélemy, but alleges that the sums have also been seized by one Lajus. The seizure by Lajus does not otherwise appear in the admiralty court registers of hearings, but may be an admiralty seizure, as the court orders the Charest to hold the sums while the two matters are sorted out.

Seizures before judgment were also available to the Crown suing for droits of admiralty. On January 15, 1755, the three Riou brothers of l'Anse au Coq and La Rivière des Trois-Pistoles were the object of a claim by the receiver-general for whale oil and whale bone in the possession of the brothers, allegedly coming from a whale they found on the beach. Two of the brothers admit holding oil and whale bone, but the third contests the seizure before judgment. Unfortunately for the brothers, upon being seized, one of them had written on behalf of all a

[836] Charest is a Quebec businessman and sometime shipowner. He was co-owner of *Les Deux Sœurs*, a ship sold by the admiralty court on October 24, 1753.

letter to the court "*en termes peu measurés*", and they were now obliged to pray that it not be interpreted as contesting the jurisdiction of the court.

Guillemin finds that the seizures were valid and orders that the oil and bone be brought to Quebec City. He also fines Nicolas Riou, probably the author of the offending letter, 50 French pounds in contempt. The matter does not end there however. On May 22, 1755, once the navigational season recommences, the oil and bone were ordered to be discharged in Quebec City from the ship belonging to the brothers.[837] Two days later, the court rescinds the seizure, upon proof being made to the effect that the whale had been caught offshore by the brothers. However, the fine for contempt stands, and the release of the goods is made subject to its payment.

The Crown could also obtain the seizure before judgment of a ship that omitted to obtain *congé* or permission to sail, pursuant to the Ordonnance of 1681.[838] On May 6, 1755, a ship belonging to Charles Sévigny and Maurice-Jean Boullague was seized for having sailed from Quebec without permission. It is not clear which ship was seized, but Sévigny appears earlier in the register as part owner of the *Dauphin* and of the *Saint-Louis*.

In fact, the two vessels may indeed have been but one. On February 20, 1755, the *Dauphin*, described as a 17-ton ship then belonging to Sévigny and Michel Mailler was sold by the court in auction to a certain Mr. Maurice.[839] The purchaser's name is not more explicitly stated in the register, and it might have been Maurice-Jean Boullague. On April 16, 1755, Sévigny purchases what is described as the 15-ton *Saint-Louis* at another court auction from Maurice Jean, a local baker, and Thomas Brillant, a mariner. Again Maurice Jean could have been the purchaser of the *Dauphin*. However, regardless of the name of the ship seized for not obtaining permission to sail, Sévigny pleads necessity, in that he sailed without waiting, in order to load and bring back to

837 This order is not in the registers but appears in the Dispositif. See the text accompanying note 712 above.

838 See the text accompanying note 678 above. The references in the register are to Book I, Title X, art. 1 of the Ordonnance of 1681.

839 Ships sold at auction by the court are often owned by more than one person, most often where they cannot agree on the value or use of the ship. However, single owners are not uncommon in auctions by the court. On July 30, 1755, Jacques Perrault, a Quebec businessman, has his ship *Marie* auctioned by the court. At the close of the fourth session approaches, Perreault offers amounts for his own ship to increase the bids, but the manoeuvre fails and Perrault ends up buying his own ship back. He obviously need not pay himself, but he is ordered by the court to pay auction costs, set at 86 French pounds. He does not try his luck again with another auction of the *Marie*.

port a cargo of flour, urgently needed by the Quebec public. Guillemin must have had some sympathy for this argument, as the fine given Sévigny is set at only three French pounds.

In another instance of the seizure before judgment of a ship for omitting to obtain permission to sail, Joachim Vautour admits having sent one of his children with his son-in-law to fish for salmon not far from his home. The Crown seizes before judgment the fishing boat and the fish actually caught, which, from the register, is cod. After a hearing on October 21, 1755, the admiralty court orders Vautour to pay a fine and not to repeat the performance, but again limits the fine to the nominal sum of three French pounds, and releases the seized goods.

Admiralty auctions could also take place over a money dispute. In September 1755, the court heard a claim by Jean-Jacques Zorn, a local merchant, against one Pélissier, an employee of the Bureau du Domaine, the Customs office in New France. The dispute concerned a loan made to allow Pélissier to purchase the schooner *Belle Louise*. Zorn seizes the ship before judgment, alleging an outstanding debt of 600 French pounds. On September 13, 1755, Guillemin finds the seizure to be valid, and orders the auction of the vessel to pay the debt.

On September 24, 1755, before the sale of the *Belle Louise*, a Louisbourg merchant, David Augié files a claim against Cézard Depage, alleging that the defendant is the true owner of the schooner. Augié alleges that the master of the schooner holds an envelope containing 627 French pounds, covered by a bill of lading, but not discharged in Quebec. Augié also requests the honoring of a bill of exchange for 534 French pounds issued by Depage, either in payment in cash or in beaver pelts. Depage admits having received the envelope and, although a portion of the 627 pounds was spent in Martinique, undertakes to remit the balance and issue a bill of exchange for the portion used. The court so orders, and orders Depage to pay to Augié the 534 additional French pounds.

There is no mention made in the Augié entry of a finding concerning the ownership of the *Belle Louise*. However, that same afternoon, in the LaCoudray residence in Cul-de-sac, the court continues the auction of the *Belle Louise* in the Zorn dispute. The third and final auction is held on October 1, 1755, at which time the schooner is adjudged for the price of 3,300 French pounds to the claimant Zorn, being the highest bidder. Presumably the loan of 600 French pounds was only a portion of the purchase price paid by Pélissier, or the vessel had been greatly improved

under his ownership. Zorn and the *Belle Louise* appear later in unrelated wage disputes in the registers of hearings, but no more is heard of Mr. Pélissier.

Seizures before judgment would normally be sought and obtained at the outset of an action. However, they could be sought at any time prior to final judgment, and even following judgment from which an appeal to the Conseil supérieur had been taken. In this sense, the decision would not yet be final. An example appears in the register of hearings on September 27, 1755 wherein several merchants claim various sums from Joseph Cachelièvre. The defendant was apparently unsuccessful earlier in the proceedings, as reference is made to a decision that does not appear in the extant registers of hearings. In order to lead to an appeal to the Conseil supérieur, the earlier decision must have been from the admiralty court, but it is not clear in the register, and could refer to an earlier arbitral award. Reference is made to Pierre Révol, a businessman, with whom Cachelièvre was involved in contemporaneous litigation.[840]

It is the merchants' allegation that the earlier decision is under appeal, and they seize the assets of both Cachelièvre and of a garnishee, Jean Durant. Cachelièvre is not referred to in other admiralty register entries, but it is clear that Jean Durant was a Quebec shipowner,[841] navigator and pilot.[842] The claimants now ask the admiralty court to declare valid the seizures pending the appeal. The court grants the motion. However, Cachelièvre surprisingly pleads that he has not appealed the earlier decision, but rather abandoned his claim, and should not be seized to cover costs on an appeal he did not undertake. In the event, Durant is ordered to pay to the claimants the sums he owes to Cachelièvre, and these sums appear sufficient to cover the full amount in dispute and the costs awarded to the claimants, whatever the earlier proceedings might have been.

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840 An entry for August 5, 1755 in Conseil supérieur register 67, folios 22v to 33, BAnQ reference TP1, S28, P2117, refers to Cachelièvre and Révol being involved in litigation with several merchants, but the entry may be for an unrelated claim.

841 In the entry in the register of hearings for May 13, 1754, Charles Nadeau, master of the ship *Saint-Jean-Baptiste*, successfully claims wages against Durant, Louis Gunière and Marc Desroche, as co-owners of the vessel.

842 In the entry for September 11, 1754, Jean-Baptiste Vallier claims his portion of revenue from fishing on an unnamed vessel. Durant is described as a coast pilot. In an earlier entry dated September 28, 1754, Durant and Pierre Vallière, both described as mariners, face a claim of diffimation for having insinuated that the claimant, Daniel Dome, had stolen some codfish. They repent, and are ordered to desist in future from such activity, and to pay costs to the claimant.

Seizures before judgment were available in claims for the carriage of goods and for unpaid freight. In September 1758, the court heard a motion to quash a seizure before judgment of sums held by Jean-Claude Louet. It will be recalled that Louet was registrar of the admiralty court and that the court sat in his house on Cul-de-sac when auctioning vessels.[843] However, it is unlikely that the sums seized would be sums deposited with the court, and Louet was also a practicing notary. As there were no advocates in New France, notaries were often retained not only to draft wills, marriage contracts and commercial agreements, but also to hold sums on behalf of their clients, and it is likely that the seized sum was privately held by Louet in this capacity.

The suit involving Louet had been taken by the widow Petit, a French merchant of Saint-Malo. She was the owner of the ship *Comette* and had apparently sold 65 barrels of salt to one Jacques Bionneau, since deceased. Petit mandates Quebec businessman Jean Taché to institute proceedings in the admiralty court against François Dumergue, bailiff of the admiralty court, but also curator of the succession of Bionneau.[844] In an earlier entry dated August 5, 1758, the admiralty court determined the price per barrel of salt to be ten French pounds, but the seizure predated the decision, and it is not clear whether a final judgment was at any rate rendered at the August hearing. Not wishing to err on the side of insufficiency, Petit seizes 10,000 French pounds in the hands of Louet. On September 6, 1758, the admiralty court recognizes the seizure as having been valid, notwithstanding the decision on the value of the salt.[845] The case is yet

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843 See the text accompanying note 813 above.

844 It is likely that Jean Taché and Jean-Pascal Taché, names which appear often in the admiralty registers of hearings, were in fact one and the same person. Taché might have been a French national, as the first entry of the name in the extant registers on July 12, 1741, states that the claimants, including Taché, were all *négociants* from Paris, and in a case described in more detail in the text accompanying note 834 above, Taché is said to be absent from the colony, and was thus likely in France. But in July 1741, Taché is definitely in Quebec as he acts as the proctor of the group of merchants seizing before judgment by garnishment, amongst others, the master of the *Saint-François*. The absence of advocates in New France meant that not only notaries and other court officers could act as proctors, but any other person as well. As time passed however, the role of proctor, at least in the admiralty court, became more and more restricted to a small group of practicing notaries.

845 It is unclear why such a large seizure would be condoned by the court for a 650 French pound debt. However, on the same day as one of the hearings of the Petit claim, August 5, 1758, Taché was involved in another case against Dumergue, again acting as curator for the succession of the defendant in that case, in which large sums were involved. It is possible that the seizure before judgment was to cover other claims and that the seizure was not further contested once the court acknowledged the Petit seizure. Dumergue was not only active as bailiff and curator. In at least a half dozen admiralty register entries between 1740 and 1758, Dumergue appears as proctor for a party, including his last appearance as proctor on September 21, 1758, wherein the court declares valid a seizure before judgment obtained by Dumergue acting for the payees on a bill of exchange issued by Pierre Révol, a Quebec businessman and frequent participant in admiralty court cases.

another illustration of the jurisdiction of the court over contracts of sale where carriage was by sea.

Perhaps one of the most interesting auction cases, at least from a constitutional law point of view, is that of the 100-ton British vessel *Brittannia*, sold by the Quebec admiralty court. The *Brittannia* had been captured by the French vessels *Machault* and *La Chezine*. Prize cases were not rare during the Seven Years War and, notwithstanding the limitations of the Règlement of 1717, several captured vessels were sold at auction by the court.[846] However, the *Brittannia* sale has the particularity of having taken place at the beginning of March 1760, six months following the battle of the Plains of Abraham. The entries in the register for February 28, 29, March 1 and March 3 indicate that the auction took place over four sessions with the last session ending with the adjudication of the vessel to a Mr. Proust for the sum of 8,300 French pounds. Since the fall of Louisbourg in 1758, Quebec had been the sole admiralty court in New France. It is unlikely that the sale took place under the noses of the British in Quebec City, especially considering the sale was of a British ship captured by the French.

The four entries, the only entries in the final register of hearings posterior to 1759, are not signed as were all previous entries. Guillemin was still in New France, and indeed stayed until his death in 1771. It is likely that the court arranged to sit in Three Rivers as the masters of the capturing ships *Machault* and *Chezine*, usually present at such auctions, were absent. The chief officer of the *Machaud*, Mr. Giraudais, was stated as being absent, as was the owner of the capturing ships, Joseph Cadet, in charge of munitions for the French, who was represented by Mr. Proust, a notary of Three Rivers. The register states that the usual notices had been posted, but does not say in what city.

The fall of Montreal was in September 1760 and it is possible that the registers had been removed from Quebec City following the last entry for 1759, dated August 18 of that year, but prior to the arrival of the British in September. The auction ends on March 3, 1760 with the last

[846] For prize limitations, see the text accompanying note 680 above. The entry immediately preceding those of the *Brittannia* (probably *Britannia*), concerns the auction of another British prize, the 120-ton *Darthemout* (probably *Dartmouth*), captured by Mean Hiriard, commander of the *Collibry* (probably *Colibri*), sold for 15,400 French pounds to a Mr. Pénisseau (probably Louis Pénisseau, who appears in earlier register entries).

entry in the last register of hearings. The prize is awarded to Mr. Proust, acting on behalf of Mr. Cadet. The Quebec admiralty court would never sit again.

From Seizure before Judgment to Action *in rem*

The admiralty courts in New France, and the judges or lieutenants of those courts, exercised an exclusive jurisdiction in maritime matters that involved a wide array of heads of jurisdiction, contained in the provisions of the Ordonnance of 1681. That jurisdiction encompassed virtually all maritime matters that arose in the colony. The judges of the Quebec Vice-Admiralty Court, speaking at the beginning of the nineteenth century, described the admiralty courts of New France as having being vested with powers more extensive than those granted to British vice-admiralty courts, and as having jurisdiction over a wider inland waterway.[847]

The jurisdiction exercised by the French admiralty courts over contracts for the sale of goods carried or to be carried by sea is perhaps the most outstanding example of this extensive jurisdiction. British admiralty courts at home and abroad were confronted with the concept that contracts entered into within the body of a county could not be of their jurisdiction.[848] Sales contracts were usually of this nature, whether or not the goods were to be carried by sea. But the jurisdiction of British admiralty courts varied over the centuries, and was not always as limited as it was when the reporting of admiralty cases began. In earlier times, English admiralty courts exercised jurisdiction over contracts made "beyond the seas", which included contracts for the sale of goods to be shipped to England.[849]

However, with regard to interlocutory procedure, it should be obvious from the above overview of the procedure of the Quebec admiralty court, seen through the registers of hearings for the second half of the 40-year period during which the court held sittings, that the French regime court was not without remedy to secure the payment of its judgments. There were no advocates in Quebec during the French regime, but the notaries and other officers who appeared before the

847 See the comments of Justice Kerr in the collision case *The Camillus*, QVA 303-23, Stu. K.B. 158 (1823 QCVA), at page 159, reproduced in Appendix D of volume 1 of Stuart's vice-admiralty reports. See also the salvage case *The Georgiana*, QVA 510-28 (1828 QCVA), published in the *Quebec Gazette* on July 24, 1828, where Justice Kerr wistfully exclaims "So great and so extensive was the jurisdiction of the French court of admiralty at Quebec, as exercised before the conquest of Canada!"

848 See the text accompanying note 747 above.

849 See *supra*, note 810.

court were fluent not only with the procedures available pursuant to applicable legislation, including the all-important Ordonnances of 1667 and 1673, but also with seizures before judgment which were of customary origin.

The notion of contumacy for default was ever-present in Quebec during the French regime. However, unlike French medieval vocabulary, by the eighteenth century the term default was used for both the contumacy of the claimant and the defendant.[850] And default did not result in the dismissal of the defaulting party's case altogether. Failure to appear at any stage of the action allowed the other party to obtain the default of the absent party for that step, even where the step being taken had been initiated by the absent party. The usual remedy was an allowance of court costs or *frais du jour*.

The remedy of *contrainte par corps* in execution of judgments was also well-known in New France, although appears to only rarely have been imposed by, or even sought before, the admiralty courts. As noted above, on July 29, 1740, *contrainte par corps* was sought by Michel Privé, co-owner of the schooner *Madelaine*, against Charles Turgeon, the other owner, for failure to obey an admiralty court ruling of October 7, 1739, ordering Turgeon to provide an accounting of the income produced by the vessel in 1739. Turgeon then requests accounting from Privé for income earned in 1738. The court avoids the perhaps messy matter of jailing a local shipowner, by allowing the parties to have recourse to arbitration.

This is one of the few entries in the registers alluding to *contrainte par corps* and confirms the rarity of the remedy in French admiralty courts. It should be recalled that the remedy had been restricted by the Ordonnance of 1667 to final judgments for sums in excess of 200 French pounds, even though the Ordonnance of 1673 had extended the remedy to a variety of judgments on commercial maritime contracts.[851] And that the Ordonnance of 1681 had not further expanded the remedy. Thus the conclusion that *contrainte par corps* was not used as an interlocutory remedy in Quebec, and was only available in execution of admiralty judgments meeting the requirements of the Ordonnances of 1667 and 1673.

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850 See the text accompanying notes 255 and 266 above.
851 See the text accompanying note 261 above.

As concerns seizures however, the situation was different. Seizures in execution of judgment had been entrenched in the Ordonnance of 1667. Book I of the Ordonnance of 1681 had included Title XIV on the seizure and sale of vessels, and the registers of hearings demonstrate that the provisions concerning sale by auction were followed carefully in Quebec. As noted above,[852] these sales conveyed title to the auctioned ship, free and clear of all prior liens or privileges. But sale by seizure required a final judgment or a finding of the perishable nature of the goods seized. In Quebec, court auction without seizure was also a popular method of sale of ships belonging to more than one owner, where they disputed the possession, use or value of the ship. It is to be assumed that the new buyer was freed of prior interests by the court sale, regardless of whether the ship had been seized or not.

But seizure before judgment, as an interlocutory method of securing the likelihood of being in a position to execute a subsequent judgment, was not mentioned in the earlier ordonnances. The concept of *saisie conservatoire* existed in French law and in New France, not as part of the written civil law of Roman origin, but rather as a remedy available in limited circumstances in the codifications of medieval French customary law. The Custom of Paris had been codified since the beginning of the 1500s and was part of the law received in New France. References to seizure before judgment were probably derived from these medieval customary remedies.

Simple seizure, such as *saisie-gagerie*, similar to common law distress, whereby a tenant debtor was made custodian of his chattels, subject to *contrainte par corps* should they disappear, was doubtlessly part of this heritage. As was the simple seizure of cargoes by shipowners pursuant to the Custom of Orleans. Although not mentioned in the Custom of Paris, this latter remedy, with its marine flavour, was doubtlessly known to the men of law practicing in the admiralty courts in France and in Quebec. Further, both customs recognized the simple seizure of a foreign debtor's assets under the medieval charters of the *villes d'arrêt*, much as foreign attachments were recognized in the medieval charters of several English cities. Perhaps more to the point, simple seizures could be obtained in commercial matters wherever bills of exchange were involved, or where a merchant was insolvent or dilapidating his assets.

[852] See the text accompanying note 269 above.

But, as argued above, *saisie conservatoire*, *saisie-gagerie*, simple seizure or seizure before judgment, regardless of which label is preferred, were never remedies of general application and never specifically associated with French maritime law.[853] *Saisie conservatoire* would eventually be codified into the French procedural codes, but only in a manner as timid as in the customary law. French lawyers had to wait until the ratification of the 1952 Arrest Convention to obtain access to the routine arrest of sea-going ships. That convention, and the 1955 incorporation of seizure before judgment or *saisie conservatoire*, were made available in France virtually simultaneously, although for three more decades the latter would remain available, in cases where the convention did not apply, only where urgency could be demonstrated.

How then did seizure before judgment find its way into eighteenth-century French maritime law and how important was the remedy to French admiralty practice? It would appear that the remedy was known to exist in limited commercial circumstances in early modern French law and was obviously a useful remedy wherever it was available. The volatility of maritime assets, principally sea-going ships, would easily lend credence to the need for a preliminary marine remedy, much as would a claim against a foreign resident or against a merchant dilapidating his assets. It should not be surprising that seizures before judgment are thus to be found in the registers of hearings of the Quebec admiralty courts.

But it would be an exaggeration to say that it flourished in the admiralty records. Seizure before judgment was in the toolbox of admiralty practitioners, but never became as common a step in admiralty proceedings as it did in English maritime law. In most of the entries concerning seizures before judgment in the registers of hearings, the court faces conflicting views of its application to the facts in the case at hand, but not of its existence, and nowhere is it stated that a party argued that the remedy was non-existent or not applicable to maritime disputes.

The study of proceedings in the admiralty court in Quebec City over the period of 1740 to 1760 will not allow one to draw general conclusions as to the use of seizure before judgment in non-marine cases. Nor will it allow one to conclude that the remedy was or was not in use in France at the time. However, the timid references to seizure before judgment in the French customary law, and its absence in the Ordonnances of 1667 and 1673, and in the all-important Ordonnance

853 See the text accompanying note 278 above.

of 1681, might lead one to believe that the remedy was virtually unavailable in the admiralty courts. The present enquiry confirms, on the contrary, that seizures before judgment were in use in admiralty proceedings throughout the French regime.

It can be concluded however, that that use was neither an inheritance of Roman law, nor even of medieval French law, and was a remedy whose use was particular to the admiralty courts. Its use, and probably its very origin, resulted from the peculiar and exceptional remedies made available to claimants under various circumstances in medieval French customary law. Maritime law was not the only law which could make use of these remedies, but the admiralty judges probably became the biggest users of seizures before judgment. Otherwise, the remedy would have appeared more prominently in the books of the French civilians and in the codes that the French brought to much of the civilized world.

On the contrary, the ratification of the 1952 Arrest Convention was the first time the French admiralty courts were endowed with a true *in rem* variety of seizure before judgment or *saisie conservatoire*, at least for international voyages. Whether or not the origin of English *in rem* process has any link to France, the reverse is certainly true, and the widening of the interlocutory remedy of seizure before judgment since the 1950s is in no small part linked to that convention which, at least in maritime cases, has greatly increased the availability of pre-judgment security.

Yale and Prichard concluded that *in rem* process could not be of Roman law origin. That is the least that can be said. It can now be said with certainty that Roman law and medieval civil procedure in Europe and in France were not the source of the English *in rem* process. But then how was *in rem* process developed? The answer to this question can only lie in the records of the British admiralty courts.

THE PROCESS OF THE QUEBEC VICE-ADMIRALTY COURT

Permanent vice-admiralty courts were known in British North America since the end of the seventeenth century, and it was of little surprise that a court would be erected in Quebec City following the Treaty of Paris in February 1763, whereby New France was ceded to the British. In the interval between the fall of Quebec in 1759, and of Montreal in 1760, and the treaty of 1763, the military courts of General Murray handled whatever disputes there might have been. But, as of the end of 1763, plans were made for a new vice-admiralty jurisdiction in the old capital city. As noted above, the judge of the Irish admiralty court had been designated in December of that year to be the first vice-admiralty judge of Quebec, but it was not until the summer of 1764 that James Potts would be appointed.[854]

Quebec City was not an outpost at the time, at least by North-American standards. Specialized admiralty courts had been in full operation since 1719, and courts in New France had been hearing maritime cases in first instance and on appeal for over a century. British vice-admiralty courts had been in operation sporadically over the same period, and as permanent courts in the American colonies since the beginning of the eighteenth century. Regardless of the intent of the Royal Proclamation of 1763, and of the *Quebec Act* of 1774, admiralty for the British was a civil law jurisdiction, as it had been for the French admiralty courts, and thus was not expected to be *droit nouveau* with the arrival of British law in the former French colony. It was probably considered to be the one jurisdiction where the arrival of the British would have the least effect.

But the jurisdiction and process of the two admiralty courts was far from identical, even though they had much in common. The French drew their remedies from French maritime law, which had only recently been codified and standardized in the Ordonnance of 1681, and which was administered by coastal admiralty courts around France with a central admiralty court in Paris, arguably more ceremonial than authoritative. The substantive maritime law codified in the Ordonnance of 1681 was of multiple origins, including the medieval Mediterranean codes and the Roman law of Justinian's Digest. French maritime law, like the rest of the French law received in New France, was of both customary and Roman origin.

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854 See the text accompanying note 481 above.

The British drew their maritime remedies from civilians working in the central High Court of Admiralty in London, which was anything but a ceremonial jurisdiction. In fact, as the period under review in this enquiry begins, London had already been the centre of English maritime law for centuries. The vice-admiralty courts around the coast of England were local jurisdictions very much under the watchful eye of the central court, and subject to its appeal powers. In North America, the vice-admiralty court system was an extension of the jurisdiction of the High Court of Admiralty and has been described in some detail.[855]

But the North-American vice-admiralty courts handled heads of jurisdiction in addition to those granted to the vice-admiralty courts of the coast in England. That additional jurisdiction was particularly centred on the Navigation Acts, which had given rise to the creation of the vice-admiralty courts in the American colonies at the end of the seventeenth century, and again in Canada as the French ceded their grip on the land.

The Jurisdiction of the Quebec Vice-Admiralty Court

Admiralty jurisdiction has been discussed in the context of Canada's *Federal Courts Act*.[856] The jurisdiction conferred on Canada's Federal Courts is a consolidation of the principal attributes of admiralty jurisdiction as have been recognized in Canada, but also in the United Kingdom. But the theoretical span of admiralty jurisdiction and the day-to-day business of a vice-admiralty court can differ. As shall be seen, the work of the Quebec Vice-Admiralty Court differed even from the business of the High Court of Admiralty.

The British vice-admiralty court system was an extension of English admiralty jurisdiction. The vice-admiralty court created in Quebec was part of this system, and although the caseload started slowly, the court would become the most active instance court outside of London, surpassing the volume of civil suits before the Halifax Vice-Admiralty Court.[857]

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855 See the discussion starting with the text accompanying note 452 above.

856 *Federal Courts Act*, R.S.C. 1985, c. F-7. See the discussion of admiralty jurisdiction starting with the text accompanying note 45 above.

857 Instance case files in Halifax were numbered, at least from 1803, but the numbering scheme changed over the years, with the first system simply assigning numbers to instance cases from number 1 as they were commenced. See *supra*, note 740. There are, however, cases to which higher numbers were assigned. Thus the *New Providence*, a Customs case, was assigned the number 600 in 1814 and two other Customs cases in 1815, the *Tudor* and the *Sherbrooke* were respectively assigned the numbers 700 and 704, although other seemingly

Suits involving the Navigation Acts

Like the other North-American vice-admiralty courts, the Quebec Vice-Admiralty Court exercised jurisdiction over collision, salvage and wage claims, as well as over all aspects of human relations on board vessel, involving passengers, officers and crew. Vice-admiralty courts were also given statutory jurisdiction over the illegal slave trade and piratical offences, but for geographical reasons, these cases were not common in Quebec. However, jurisdiction over Navigation Act suits was always an important part of the Quebec court's docket.

identical Customs matters followed the usual numbering system applicable at the time of filing. The logic of the division of instance files between LAC and the Halifax archives is anything but clear, and even though, as pointed out above, the LAC materials are almost all affairs of the Crown or of prize, they do not appear to have been kept separately in the Halifax records. In the same manner as for the Quebec materials, the fact that the Exchequer Court took over admiralty work in 1890 may have eventually led to earlier materials being stored in the Exchequer Court Halifax office and later transferred to Ottawa. The Halifax Vice-Admiralty Court records in the Nova Scotia archives consist of court registers and individual case files. The registers include court registers *per se*, as well as lists of agency appointments found in the RG1 class, volumes 499, 500 and 501, and, in volumes 500A and 501A, lists of vessels captured in prize. The court registers, found at RG1, volumes 491 to 498 and 499½, are unlike either the registers of the Quebec Vice-Admiralty Court or those of the High Court of Admiralty. See *supra*, note 469. They consist of a series of nine large volumes with pages of paper 15 to 18 inches in length, formerly bound but now unbound for microfilming purposes. They contain instance and prize cases. With the exception of volume 498 for 1813, the writing is fair and, for all but two volumes, the entire pleadings of each case are written out in longhand, including interrogatories and the decree and reasons for judgment given by the court. Thus a case can occupy 20 or more pages in a register. The entries are roughly chronological, but not rigorously so, and entries are obviously made from individual copies of the pleadings that may or may not still exist independently of the registers. The period covered by the registers is from the very beginning of the court in 1749 to 1801 with one final register for 1813. However, the last two volumes in the series are not like the others. Volume 499½, covering 1794-1801 is a clean copy like the others, but contains only a reference to the proceedings and not full transcriptions of pleadings. It is larger than the other volumes and contains 552 numbered pages of approximately 18 inches in length, as well as another 96 unnumbered pages containing "settlements" or amounts paid in and out of court for various cases. With the exception of the settlement entries, the volume resembles the registers kept by the Quebec Vice-Admiralty Court during the corresponding period, but the entries are not as precisely chronological, and the former practice of grouping files together is maintained, without including the pleadings. Volume 498, the volume for 1813, is not a definitive register and has more the appearance of an Assignation Book in that the reference to or title of the suit is entered in a fair hand, if not in chronological order, but the information is written in a rough manner. Entries are the opposite of the former volumes in the series, being very brief. The year 1813 was a very active one for the prize court due to the war with the United States and most but not all entries concern prizes. Some entries are identified as Prize Court or Instance Court but most must be read to determine the subject matter of the case. A typical entry in the 1813 register will give the date and name of the captured ship and add: "The Court being open and the papers read, the Judge, on motion of the King's Advocate, condemned ship and cargo as good and lawful prize to the captor." Contrary to the prize cases in earlier volumes of the series, no details will be recorded of where, when or how the capture took place. An entry for October 29, 1813 refers to the proceedings continuing "in minute book G, page 32" but no such volume appears to have survived. It is unclear what other registers were maintained in 1813, but the final register in the series is not a definitive one. In all, there are referred to or transcribed more than 800 instance and prize cases in the registers for the second half of the eighteenth century, even excluding the register for 1813 which refers to more than 200 additional cases. Excluding 1813, the average combined number of instance and prize cases per year is 16, but these are cases that made it to court. Others may have been abandoned or settled at an early date.

In fact, the first case to be heard by the Quebec court,[858] involved the importation of wine from the United States, still a British colony at the time, contrary to the Navigation Acts. The ship *Phoenix* was arrested and sold by the court. Considering that the crew had participated in the illegal importation, knowing that the formalities of the Navigation Acts had not been met, their wages were not to be paid out of the proceeds of sale.[859]

Over the first ten years of the Quebec court's existence, there were almost as many Navigation Act claims by the Crown as there were wage claims by private seafarers, the mainstay of all British admiralty courts throughout the period under review. During these initial years, wage claims combined with Navigation Act claims were twice as numerous as all other maritime claims before the Quebec court combined. However, the continuous rise of wage and other instance claims would eventually leave Navigation Act claims far behind in number, if not in importance.[860]

Navigation Act cases remained important for the Quebec court well beyond the American Revolution and, in fact, the impossibility of obtaining any valid Customs document in American

858 *The Phoenix*, QVA A-64 (1764 QCVA).

859 The same restriction on paying crew wages was applied in another Navigation Act suit, *The Two Friends*, QVA F-64 (1764 QCVA). During the first decade of the Quebec court's existence, the illegal importing of alcoholic beverages constituted the majority of Navigation Act cases. See, for example, *The Two Friends*, *supra*, *The Charming Peggy*, QVA O-67 (1767 QCVA), where gin was imported from Guernsey, *The Charles of Dublin*, QVA W-69 (1769 QCVA) and *The Cesar*, QVA F^2-74 (1774 QCVA). In at least two other cases, QVA H^2-74 (1774 QCVA) and QVA J^2-74 (1774 QCVA), the ships importing liquor were not identified, the cargo only being found following discharge. Most of these cargoes were imported from American ports, illustrating the rigidity of the Navigation Acts. Cargoes, even from another British port, including the American ports at the time, were caught by the legislation. In order to import cargoes from the other colonies, a customs document, usually in the form of a seal or cockett, made of paper and attached to the cargo, would have to be first obtained from Customs officers in the port of shipment. This restrictive interpretation was contested by the owners of the imported cargo in *Eleven Packs of Beaver Skins and Furs*, QVA AA-84, (1784 QCVA), but the file was abandoned prior to obtaining a ruling. In a later case, *The Harrower*, QVA 131-15, Stu. K.B. 80 (1816 QCVA), reversed, Stu. K.B. 86 (1817 H.M. Customs Commrs.), the Quebec Vice-Admiralty Court condemned the vessel and her cargo for having infringed the Registry Acts in that the name of the current master was not entered on the register, but the Customs Commissioners in London determined on appeal that vessels in the internal trade of a colony need not be registered, and that inter-colonial carriage between Quebec City and Montreal did not infringe the Navigation Acts. See the text accompanying note 865 below. In another case, the Quebec Vice-Admiralty Court held that the ship exporting a cargo could commence loading prior to obtaining a cockett. See *The Mary*, QVA U-69 (1769 QCVA). This ruling was appealed by the Crown, but the appeal was abandoned prior to any further ruling. For the confused text of a rare surviving cockett, see *The Curlew*, QVA 137-14 (1814 QCVA). The cockett in that case is 10 × 25 cm and contains incoherent references to an unrelated case. The paper of that notation was cut in strips and re-used as a cockett, underlining the value of paper, and the fact that a cockett, like a modern hatch or container seal, was only used to prove that the cargo space had not been breached since Customs clearance.

860 During the period under review, Navigation Act claims would only represent 2% of total claims before the Quebec court, as compared to wage claims, which represented more than ⅔ of the court's docket.

ports following the revolution, only served to increase the number of offences in Quebec. Perhaps the most elaborate and lengthy of all Quebec vice-admiralty Navigation Act cases is that involving the vessel *Beaver*.[861]

The *Beaver* imported rum, sugar and coffee from Saint Martin and Demerara. The cargo was cleared by Customs upon arrival in Halifax, and appeared to have been lawfully imported, and a portion thereof remained on board to be shipped to Quebec for ultimate sale. The ship had been cleared as British by the Halifax Vice-Admiralty Court, prior to proceeding to Demerara on her outbound voyage.[862]

However, the authorities in Quebec discovered that the vessel *Beaver*, of British register, owned by Angus Shaw, a Quebec resident, and manned by a master from Scotland and British sailors, was intended to be sold, upon her return, to Messrs. Robinson and Hartshorne, allegedly carrying on business in New York, where the vessel had been on an earlier voyage that year. Mr. Shaw had apparently quietly enquired as to how to close the ship's register to allow the new buyers to register her in New York.

In a letter dated July 18, 1808, given to the Crown by a certain Mr. Wilson, Mr. W. H. Robinson instructs the master of the *Beaver* to sail directly from the island of Ste-Croix to New York City, but it is likely that those instructions concerned the earlier voyage to New York, given that the vessel only arrived in Quebec City from Halifax in October 1809, where the purchase money for the ship was in the event paid. Messrs. Lawrence Hartshorne Sr. and Jr., were Halifax residents and denied any involvement in the affairs of Mr. Robinson in New York.

The Navigation Acts requiring that cargoes be carried on British ships, even from Halifax to Quebec City, the Quebec court had no problem condemning the *Beaver* as being *de facto* in breach of this requirement, given Mr. Robinson's involvement, with or without Messrs. Hartshorne, even though the register was yet to be closed. But what about the cargo interests who

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861 *The Beaver*, QVA 29-09 (1809 QCVA). An appeal was taken to the High Court of Admiralty, and the decision of Sir William Scott, as he then was, is reported as *The Beaver* (1812), 1 Dods. 152, 165 E.R. 1265 (Adm.).

862 The Halifax *Beaver* file is found in LAC's Vice-Admiralty Court of Nova Scotia fonds, RG8-IV, volume 157. The vessel had, upon her arrival in Halifax, been arrested as being in breach of the Navigation Acts, but the charges were dropped when the vice-admiralty judge decreed that the vessel was British-owned.

had no advance notice of the intentions of Mr. Shaw? The cargo was condemned to confiscation along with the ship in the decision of James Kerr, the vice-admiralty judge in Quebec.

In order to avoid the loss of their cargoes, at least pending the appeal of the decree, the cargo interests offered to file the appraised value thereof in the vice-admiralty registry. The shipowner did the same. The court preferred that these important sums[863] be paid to John Hale, Paymaster General of His Majesty's forces, to be deposited in his vaults under the seal of the court. Several of these sums were later, with the court's permission, transferred by John Hale into the custody of Edward Cenche, Deputy Commissioner-General.

On appeal to the High Court of Admiralty, Sir William Scott felt compassion for what appeared to be innocent shippers, but found that the onus was on them to take care that they placed their goods on a proper vehicle. He noted the right of suffering cargo interests to seek a remedy over against the shipowners, although they may not be "in point of solvency able to make satisfaction", but even if not solvent, the shipowners "may be made to answer in their persons what they cannot in their purses".[864] The cargo was thus also condemned on appeal. The proceedings dragged on in Quebec until July 8, 1816, when the vice-admiralty judge ordered that costs and disbursements be paid to the collector and comptroller of Customs, on behalf of the Crown. Presumably, the sums held in lieu of the ship and cargo had already been paid out, as was the custom, to the collector and comptroller, to the Crown, and to the governor of Quebec in the traditional equal shares.

The application of the Navigation Acts had always been a point of contention. In *The Harrower*,[865] the vessel was accused of sailing from Quebec City for Montreal in an unregistered ship, in breach of the Registry Acts, and of having carried a cargo in breach of the Navigation Acts. It was however discovered in the course of the proceedings, that the ship had in fact been registered in Quebec many years prior, and the only infringement of the Registry Acts appeared to be the absence of endorsement of the new master, Captain Joseph Gignac, on the register. The vice-admiralty judge, James Kerr, condemned the vessel and her cargo for this offence.

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863 The *Beaver* was appraised at £800 and the cargo at over £4,000.
864 *The Beaver* (1812), 1 Dods. 152, at page 159, 165 E.R. 1265, at page 1268 (Adm.).
865 *The Harrower*, QVA 131-15, Stu. K.B. 80 (1816 QCVA) and Stu. K.B. 86 (1817 H.M. Customs Commrs.)

The case was appealed to the Commissioners of His Majesty's Customs in London, and their decision is instructive with regard to the application of both the Registry Acts and the Navigation Acts. The commissioners first differentiate between intercolonial trade and internal trade within a colony. In the former case, the Navigation Acts apply as they were intended, with cargoes and ships to be cleared prior to sailing and duty paid as applicable. However, the internal coasting trade within any one colony was not to be subjected to the Navigation Acts, other than to require that that trade be carried on in British or plantation-built ships by British subjects. Nor was internal trade subject to the Registry Acts, as the legislation required no registration for internal trade and, more particularly, no penalty was imposed under the Registry Acts for failing to endorse a change of master on the register.[866] Consequently, the appeal was upheld, resulting in the restitution of ship and cargo.

The Navigation Acts were strictly enforced, even where the carrying ship had sailed from a British port with European goods. In *The Regent*,[867] a cargo of red wine was loaded in Tarragona in Spain, following the discharge of a cargo of cod loaded in Newfoundland. The War of 1812 still being underway, the master of the *Regent* then sought a convoy for England, but none was available, and joined a convoy for Guernsey. Heavy weather separated the *Regent* from the convoy, but she eventually made Guernsey, where repairs were required. The Guernsey Customs agents refused permission to unbatten the vessel's hatches to effect repairs from inside the cargo

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866 The commissioners criticized the Halifax Vice-Admiralty Court decision in *The Friends Adventure*, Stew. Adm. 200 (1810 NSVA), wherein Dr. Croke condemned the ship and cargo in internal trade. The commissioners stated that no British precedent, at least since the abolition of the Court of Star Chamber, supported the learned judge's view. By clearing a master to sail, the Customs officers recognized his authority for the registered vessel. Note, however, that where a ship was required to be registered, due to her trade, not registering the vessel gave rise to forfeiture of both ship and cargo. See *The Lively*, QVA HH-15 (1815 QCVA), where an unregistered ship, and her cargo were seized. See also *The Hercules*, QVA 392-25 (1825 QCVA), where an unregistered ship was arrested for carrying cargo from Montreal to Quebec City, apparently in disregard of the ruling in *The Harrower*. Also, whether a ship was registered or not, it had to be owned by British subjects. In *The Experiment*, QVA 187-16 (1816 QCVA), the shipowner born in the American colonies before the War of Independance and now residing in Quebec, was determined to be a British subject and the claim for forfeiture of his ship was dismissed.

867 *The Regent*, QVA 132-14 (1814 QCVA). From the certificate of registry, it appears that the vessel, formally called *La Delphine*, had been captured from the French by the English and condemned in prize by the High Court of Admiralty in January 1811. The port of registration was Plymouth, but the new owners, John Paint, Stephen Martin and William du Putron, were from the Island of Guernsey. The Navigation Acts, especially (1696), 7 & 8 Will. III, c. 22, s. II, referred to as the *Plantation Act, 1696*, gave the same standing to ships condemned in prize in England or in the colonies, as to English and colonial ships. It is this section, and section VII, that gave rise to the creation of vice-admiralty courts in the colonies. See the text accompanying note 459 above.

holds and temporary repairs were made afloat. The ship then sailed to Quebec.[868] Seized upon her arrival, the owners argued that the cargo had sailed from a British port and that the confiscation of ship and cargo would be contrary to the true intent of the Navigation Acts. The argument failed, and any insinuation that the cargo was originally destined for England was not pressed. The seizure was upheld and both the ship and her cargo forfeited.

Nor was the defence of having lawfully sold colonial produce in exchange for Spanish wine sufficient to avoid the Navigation Acts. In *The Regent*, the argument was weakly advanced. But in another Spanish wine case, *The Lightning*,[869] the second of a trilogy of Navigation Act cases concerning Spanish wine decided by the Quebec Vice-Admiralty Court on December 13, 1814, the owners, again from Guernsey, submitted a claim and affidavit arguing that the return voyage to Guernsey and then to Quebec carrying wine loaded in Valencia Spain was part of the return of fish taken to Valencia from St. John's, Newfoundland. The argument failed and the ship and cargo were ordered forfeited.

In the third case, *The Rose*,[870] the shipowner[871] and cargo interests[872] fared no better. Spanish wine had been loaded in Allicant, again in exchange for fish from Newfoundland, and the vessel then proceeded to Guernsey and to Quebec. As in the other two cases decided that day, the cargo holds remained sealed in Guernsey. In *The Rose*, the master, James Lowther, testified that the cargo of wine was taken in exchange for a cargo of fish from Newfoundland and that at the time of loading the wine, the vessel was without orders as to where the wine was to be carried. Putting into Guernsey for repairs, the ship was ordered by the owners to Quebec, where she was seized.

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868 It is unclear whether the stop in Guernsey was of necessity or for the convenience of her owners. Had the vessel sailed directly to England, the cargo could have been discharged without penalty under the Navigation Acts, but the cargo interests, Peter Brehaut and William Grant Sheppard, appear in the Quebec proceedings and claim on their own behalf and on behalf of the ship owners, and it would appear that the true intent, at least from the departure from Guernsey, was to sail directly to Quebec, thus infringing the legislation.

869 *The Lightning*, QVA 133-14 (1814 QCVA). The *Lightning* had been captured by the British as prize from the Americans and condemned in prize by the High Court of Admiralty in May 1813. The vessel was again registered in Plymouth and the five purchasers, three Priaulx brothers, John Le Marchant and Thomas Gosselin, were again from the Island of Guernsey. From an affidavit sworn in Guernsey for the Quebec litigation, it appears that the master, Peter Collas was also a part owner.

870 *The Rose*, QVA 134-14 (1814 QCVA).

871 The record does not indicate the port of registry of the *Rose*, but her owner, John Duquesne, was from Guernsey.

872 The cargo importers in *The Rose* were once again the Quebec merchants Peter Brehaut and William Grant Sheppard, claiming on their own behalf and on behalf of the ship owner.

Again, the exchange argument was ineffective to avoid the rigours of the Navigation Acts and the *Rose* and her cargo were forfeited.

In this trilogy of Spanish wine cases, the Quebec vice-admiralty judge, James Kerr, confirmed the forfeiture of each ship and her cargo. As appraisals had been made and security filed, the agreed sums were ordered by the court to be distributed in equal thirds to the Crown, to the governor of Quebec and to the collector and comptroller of Customs, who were the promovents in the prosecution of Navigation Act offences. As Customs officers were paid fees in lieu of salaries, Navigation Act offences were doubtlessly under constant survey, as the forfeiture of ship and cargo would be a lucrative endeavour.[873] The records of the Quebec Vice-Admiralty Court, through to the repeal of the Navigation Acts at the end of the period under review, reveal no further attempts to bring European wines directly to Quebec.

The Navigation Acts were British and applied in all British colonies. However, the particular situation of Quebec being an immediate neighbour of the United States, and in part populated by loyalists born in that country, called for special consideration. Immediately following the War of 1812,[874] the local Quebec legislature made a series of enactments designed to allow certain goods, not readily available or easily shipped from England, to be imported from the United States. However, even these goods were subject to import tariffs[875] and had to be declared and cleared at specified waypoints, including the River Richelieu, a popular inland waterway to the United States. Not only did these statutes, combined with the general Navigation Acts, give rise to multiple unlawful smuggling offences, merchandise was often misdescribed or imported under counterfeit cocketts or clearances to avoid the payment of duty.[876]

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873 The officers of the Customs services included the all-important positions of collector and comptroller, but also those of tide waiter and searcher, job titles that evoke the gathering of marine intelligence. But not always without risk. In *The Henrietta*, QVA 246-20 (1820 QCVA), a Quebec tide waiter, William Wilson, was personally arrested for having omitted to prosecute an appeal from a decision unfavourable to the Customs.

874 The war ended with the ratification of the Treaty of Ghent on December 24, 1814. Goods imported during the conflict were forfeited. See, for example, *Thirteen bundles of leather*, QVA 153-14 (1814 QCVA) where a cargo of leather of American origin found in Quebec during the war was forfeited.

875 As an example, the provincial legislation imposed a hefty import duty of 27% on many goods. See *The William*, QVA 155-15 (1815 QCVA), referring to provincial customs duties statute (1795), 35 Geo. III, c. 9 and *The Swiftsure*, QVA 156-15 (1815 QCVA), referring to tobacco duties pursuant to provincial statute (1795), 35 Geo. III, c. 6.

876 See for example *The Hannah*, QVA 152-15 (1815 QCVA), where a clearance was allegedly counterfeit. However, the Crown was not always successful in contesting the authenticity of documentation. In *The Mary*

Seizures of undeclared cargo were generally successful, although not always so, and Customs officers often faced violent reactions of crew members attempting to smuggle cargo into the colony.[877] Violence could also come from shore.

In *The William Money*,[878] the tide waiter, William Kernaghan, alleged having been assaulted by Robert Symes, the importer of certain goods from China. The evidence established that three young students, "habited" in seminary robes, had boarded the ship out of curiosity in October 1834 and met Mr. Kernaghan on the gangway while disembarking. Noticing that one young man was carrying a piece of silk material, commonly called *gros de Naples*, the tide waiter seized the package as being illegally imported. The explanation of the students being in French, Mr. Kernaghan could not understand, but explained in English that they could make a claim to the silk at the Customs House.

Mr. Symes spoke to the students on shore a few minutes later, prior to boarding and asking Mr. Kernaghan why the silk was seized. The testimony differed as to which man first started calling the other names, and as to who first struck the other. The chief officer testified that both men were fighting and that the tide waiter proposed a duel to Mr. Symes. The master ordered both men on shore. During the struggle, the package of silk was somehow retrieved by the students, who immediately went about their way. Proceedings were issued, arresting Mr. Symes for aiding

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and Bell, QVA 154-14 (1814 QCVA), the court rejected the Crown's plea and restored the goods to their importer. In a later case, *The Quebec*, QVA YY-23 (1823 QCVA), the court faced the question of fact whether five customs permits, purportedly issued at St. Johns on the River Richelieu, were genuine or counterfeit. On some occasions the cargo was thrown overboard and lost to avoid detection by a boarding Customs official.

877 In *The Southampton*, QVA 523-28 (1828 QCVA), the defendant master, Henry Tuzo, reported the ship's cargo to Customs officials upon arrival in Quebec from Grenada, but, alleging to be unaware of their existence, omitted to mention two barrels of muscovado sugar stowed in the vessel's forecastle, which was normally reserved for the use of the crew and not a common cargo hold. The chief officer, Bernard Albouy Ingham, also alleged ignorance of the sugar, but two crew members admitted having noticed barrels of sugar hidden "with cloaths and rubbish" the day prior to departing Grenada. However, the tide waiter, John Fife, testified that while trying to seize the undeclared sugar, the barrels were thrown overboard by the crew under the chief officer's command. Another local witness, William Speedy, testified that a certain Mr. Dunn of Quebec had hired Mr. Speedy to bring his boat alongside the *Southampton* during the night, and then asked him to leave the boat there for an hour or so. Upon the return of Mr. Speedy, there were eight barrels of muscovado sugar in his boat, which were taken to a house in Quebec City. Two nights later, Mr. Speedy noticed his boat was gone from its usual moorings and was again alongside the *Southampton*, being loaded with more barrels of sugar by the chief officer and crew. Protesting that he wished no more cargo to be put into his boat, Mr. Speedy tried to get the barrels out, but eventually agreed to leave them at Cul-de-sac. Speedy reported the incident to the tide waiter, who then attended in the forecastle to find the two remaining barrels of sugar. The vice-admiralty judge, James Kerr, fined the master £100. It is unclear why the ship was not forfeited, but probably the court believed the master, although not the chief officer.

878 *The William Money*, QVA 927-34 (1834 QCVA).

and abetting the unlawful importation of goods. However, when the father of the student found in possession of the silk, testified that the silk had been purchased from a Quebec merchant as measuring nine yards, but in fact measured only seven, and that he had given it to his son to return to the merchant for measurement, Justice Kerr dismissed the case on an interlocutory motion.

Suits involving Violence on Board

Disputes involving violence on board ship constituted an important subject matter within the jurisdiction of British admiralty courts. And violence was common on board ship during the period under review, apparently moreso under the British than under the French regime, judging from the relatively few references to violence in the French registers of hearings. Violence would become an even more important part of the docket of the Quebec Vice-Admiralty Court than of the High Court of Admiralty. The vessel *William Money* is an eloquent example. The ship was not only the site of a violent confrontation concerning the alleged importation of silk in October 1834, but would also be the source of several other suits by crew members alleging violent acts on board.

In June 1833, the *William Money* had set sail on a voyage from London to Canton in China to Quebec City and eventually back to London. In fact the ship only arrived in Quebec in September 1834, where she discharged her cargo of Chinese goods and loaded a cargo of timber for England. However, after sailing in November, 1834, the vessel grounded near Manicouagan, where the crew were dismissed. The record does not establish whether the ship ever sailed again, or became a total loss, but it is clear that the master, John O'Brien and the chief officer, Thomas Simpson, were men of a violent nature.

The first mariner to issue suit and arrest the master and chief officer of the *William Money* was William Haydon.[879] Haydon claimed he was beaten by both men of the coast of Malay, the master allegedly breaking the speaking trumpet to pieces, so hard were the blows given to the claimant with that instrument, in punishment for having asked the mate to trim the yardarm in order to allow Haydon to furl, or roll up, the sails to reduce the effect of the wind on the vessel.

[879] *The William Money*, QVA 925-34 (1834 QCVA). For another suit resulting from a request to change course to facilitate furling, see *The Coldstream*, QVA 750-32, Stu. K.B. 518 (1834 QCVA), and the text accompanying note 938 below.

In a separate action, Charles Skinner, another mariner, obtained a warrant for the arrest of the same men, alleging having also been beaten, this time for having refused to take his pea jacket off during a rain storm at the request of the master.[880] Both the master and mate beat Skinner brutally, the master whipping him with one of his favourite devices, a "pickle-toby" or rope whip, thereafter forcing Haydon to go aloft to the highest point of the rigging to grease the mizzen topmast, a dubious and dangerous task in gale winds, all the while without his jacket. After the greasing, Skinner was ordered to remain in the rigging for several hours. Skinner further alleged that, after the vessel's arrival in Quebec City, he was beaten and put in irons for seventeen hours for having opened the hatches he thought they were to discharge that day. The master allegedly hit the leg irons repeatedly with a hammer to increase his punishment.

Not to be outdone, the master replied that Skinner was wearing two jackets, which prevented him from "working the lines properly", and that, in consequence of Skinner's refusal, the master had only "administered a modest correction, which in law he might", but that Skinner had then attacked the master before being restrained by the mate. As to the second event, Skinner had proceeded to open hatches without the order of an officer. Both sides put in testimony from the vessel. The mariners testified in favour of Skinner and the officers in favour of the master and mate. The record does not include the decision of the court on these claims, but seafarers were often at a disadvantage in court when contesting the authority of the master, especially where there was conflicting testimony.

Charles Skinner also claimed his wages in not one, but two separate suits before the Quebec Vice-Admiralty Court.[881] In the first, issued prior to the vessel leaving the port, he claimed his discharge and wages earned from the beginning of the voyage to the date of the action. However, during the proceedings, Skinner learned that his nightmare with the master was not over, as while speaking to his proctor at the Quebec courthouse, he was abducted and returned on board the *William Money* by force and again confined in irons. Skinner's proctor, John Maguire, sought an order of *habeas corpus*, but the vessel set sail before it could be ordered and, had it not been

[880] *The William Money*, QVA 926-34 (1834 QCVA).

[881] *The William Money*, QVA 938-34 (1834 QCVA) and *The William Money*, QVA 950-34 (1834 QCVA), the latter being taken jointly with the ship's boy, Samuel Sumner.

for the vessel grounding near Manicouagan shortly after sailing, nothing more might ever have been heard of Mr. Skinner.

As it turned out, the grounding allowed Skinner to be discharged by the master, and to find his way back to Quebec City where he filed the second claim for wages with Mr. Maguire. The record does not indicate the outcome of the suit, but the arrest of the boats belonging to the *William Money*, but not of the ship itself, indicates either that the ship had become a wreck, or that the ship was not reachable due to winter conditions. It is hoped, for Skinner's sake, that the proceeds of sale of the arrested goods were sufficient to pay his wages.

Mr. Skinner's pleadings help explain why vice-admiralty courts had more occasion to see suits alleging violence than did the High Court of Admiralty. Both courts had jurisdiction over violence on board and over wage disputes, but the nature of the seafarer's contract during the period under review is such that each mariner was expected to make a round trip, coming back to his point of embarkation and disembarking the final cargo, before being discharged and paid. The fact that the point of departure was often a port in the United Kingdom, gave the High Court of Admiralty a large volume of monetary wage disputes.

However, wage disputes could occur prior to the completion of the return trip, and often resulted from conditions on board, including violence suffered at the hands of the officers of the ship. Where this occurred, the mariner might try to obtain a discharge, without which he could not be paid prior to completing his contract. A deserting mariner received no compensation, but a mariner could be discharged by the order of an admiralty court prior to completing his contract, in which case he would be paid for his services up to the time of discharge. This was done for reasons of illness or injury and, most commonly, of violence on board. If the mariner reached the port in which the voyage had commenced, his contract was over, and he need not argue illness or ill-treatment to obtain his wages. Most mariners sought to be paid and felt lucky to be home alive. They were less likely to wish to spend money to allege violence than when they were in danger or when they had been dismissed without pay in a far-away colony.

At sea, the master and chief mate made and applied the law and no redress was available unless the claimant could get to a court of admiralty, either during or following the voyage. There are doubtlessly numerous cases where lives were lost due to violence and, where it took place during

a crossing, burial at sea would render any evidence of criminal activity difficult to establish. There were numerous cases of serious injury caused to mariners, but also to mates[882] and pilots[883] by the violent acts of the master, another mate, the owner[884] or some other crewmember. In *The Nimble*,[885] the cook alleged that he had to have his legs amputated due to the beatings he had suffered at the hands of the master, or by the mate at the master's request.[886] He obtained the arrest of the master. Apparently, according to the master, the cook had not demonstrated great culinary talents, and suffered from a lack of personal cleanliness. The outcome of the claim does not appear on the record.

The usual remedy for personal injury was a civil admiralty suit in damages for assault and battery, often combined with a suit for discharge and for wages earned. Although wages were deemed earned only when the homeward voyage was complete and the cargo discharged, mariners could sue in an intermediate port, claiming discharge and wages earned to date. Alleging illness or unreasonable injury at the hands of the master or crew, if successful, was an excellent way to obtain a discharge and wages.

A wide range of violent behaviour is documented by the records of the Quebec Vice-Admiralty Court. Mariners alleged being punched and kicked by masters, mates and owners, strangled and threatened with being thrown overboard,[887] but also being attacked by masters armed with

882 In *The Agenora*, QVA 449-27 (1827 QCVA), the chief mate sought discharge for brutality at the hands of the master.

883 In *The Montreal*, QVA 440-27 (1827 QCVA), the local pilot was assaulted by the master. Pilots were usually sent by Trinity House and assaulting a pilot could lead the authorities to intervene and arrest the ship.

884 Although masters were often part owners of the vessels they commanded, other owners could sometimes be on board as passengers or cargo supervisors. An example is *The Sir James Kempt*, QVA 395-26 and QVA 433-26 (1826 QCVA), two suits arising from events that took place on one night at Antigua during a voyage from Quebec City to the West Indies and back in the fall of 1826. On the date in question, the owner of the *Sir James Kempt*, William Douglas, was on board as a passenger. He and the master, John Scott, had allegedly inflicted extremely cruel treatment on John Bowen, cook and steward, and on John Walker, a seaman. Both men obtained the arrest of the master and owner. The defendants admitted striking Bowen, but said it was disciplinary only. Bowen was flogged naked, but the master said it was dark and he did not notice what Bowen was or was not wearing. On the same night, Walker was held over the windlass, also in a state of undress, and flogged by the master and the owner. Alcohol may have been a factor on ship and on shore, as the defendants had been in the town of St. John before being summoned to return to the vessel.

885 *The Nimble*, QVA 253-20 (1820 QCVA).

886 There are numerous cases where a master invited his chief mate to cause injury to a seaman. In *The Sir Edward Coderington*, QVA 538-29 (1829 QCVA), the master, inappropriately named Captain Kindly, invited the mate to strike the claimant, James Baningan, with a broomstick.

887 In *The Briton*, QVA 736-32 (1832 QCVA), the claimant mariner, John Mickland, was strangled by the twisting of his own neck cloth by the chief mate, Robert Gaskin, who then made several attempts to throw the claimant overboard.

cutlasses,[888] frying pans,[889] all kinds of "rope ends",[890] broomsticks,[891] staves,[892] handspikes,[893] pieces of wood,[894] pieces of iron of all descriptions,[895] shoes,[896] and even with pistols.[897]

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[888] See *The Princess Royal*, QVA 450-27 (1827 QCVA), wherein the claimant cook, John Downie, alleges being attacked by the master with a cutlass, and later with a large rope called a main royal hallyard. The master argued that Downie was intoxicated and had to be convinced in an "extremely mild" manner to go to his quarters by making use of a cutlass, during which operation Downie "got hurt a little". Justice Kerr awarded Downie his discharge and wages plus £5 in damages from the master for the attack. In *The Liberty*, QVA 278-22 (1822 QCVA), the claimant mate, George Gray, took the liberty of entering the cabin of the master, William Storey, upon hearing the master beating two of the ship's boys. Storey immediately pulled a knife and tried to "cut your petitioner's throat or run him through". Gray sought his discharge. Storey answered that Gray was interfering with the proper discipline of crew members and had threatened the master, requiring him to defend himself. The record does not reveal the final outcome of the suit.

[889] See *The Harrison*, QVA 468-27 (1827 QCVA). The *Harrison* was a passenger ship. The claimant mariner, Michael McDermot, alleged having been hit over the head with a cast iron frying pan by the master, Adam Carling.

[890] See the further case of *The Harrison*, QVA 469-27 (1827 QCVA), where Captain Carling attacked another mariner, James McKinney, with a tarred portion of rope called a laneyard rope. In *The Grecian*, QVA 507-28 (1828 QCVA) the claimant mariner, John Kemp, alleged having been hit with a rope called a fore-lift. In *The Princess Royal*, *supra* note 888, another thickness of rope end was used. In *The True Blue*, QVA 539-29 (1829 QCVA) the master, Hugh Robinson, used a doubled rope's end to beat the claimant mariner, Nicholas Bangs. In *The Kamasda*, QVA 513-28 (1828 QCVA), another passenger vessel, the claimant mariner, James Gregory, was in "the chains, to answer the call of nature" when he was ordered to furl the foretop gallant sail. Not being able to ascend the rigging immediately, the claimant was unceremoniously beaten by the mate, William Dobson, with a rope, dragged on deck and thrown down into the vessel's hold. Passengers were also beaten on occasion by the master or mate using a rope. See *The Percival*, QVA 534-28 (1828 QCVA), where the claimant passenger, Robert Kelly, alleges having been beaten by the master, David Johnston. Kelly would later be involved in another suit in damages for assault and battery. See *The Margaret*, QVA 829-33 (1833 QCVA), *infra*, note 928.

[891] See *The Sir Edward Coderington*, *supra*, note 886 and *The Kamasda*, *supra*, note 890. See also *The Atalanta*, QVA 711-31 (1831 QCVA), where the master, William Petrie, struck the chief mate, Isaac Cass, so firmly as to break the brush off the broomstick.

[892] See *The Robert Kerr*, QVA 598-30 (1830 QCVA), where the master, John Boyd, beat the claimant mariner, James Cummings, with a large stave.

[893] See *The Lady Cremorne*, QVA 673-31 (1831 QCVA), where the claimant mariner, John Miller, was struck by the master, Jonathan Hurst, with a handspike, causing the claimant to lose the use of an arm. See also *The Bee*, QVA 756-33 (1833 QCVA), wherein the master, John Allan, took the handspike from the claimant mariner, Alexander Bradley, and struck him with it.

[894] See *The Jessy*, QVA 748-32 (1832 QCVA), where, in a dispute about furling the sails, the claimant mariner, David Martin, refused to obey an order, suggesting the master might shoot the claimant, and was struck by the master, Robert Bolton, with an oak stick the master had concealed behind his back. The claimant, obviously dazed by the blow to his head, thanked the captain for it. See also *The Ocean Queen*, QVA 891-34 (1843 QCVA), where the claimant mariner, Thomas Seddon, was struck with a "heavy billet of wood", three feet in length, by the chief mate, George Rose. A second suit for assault involving the same ship is *The Ocean Queen*, QVA 894-34 (1834 QCVA), where the master, John Wood, was accused of assaulting the ship's cook, Ralph Gibson. The master and mate could not testify in their own cases, but gave supporting testimony to each other in the other's suit.

[895] See *The Lady Cremorne*, QVA 684-31 (1831 QCVA), another case from the same voyage involving Captain Hurst, where the claimant mariner, Patrick Sheridan, was struck by the master first with a pistol and then with two pieces of iron measuring 15 inches in length. See also *The Erato*, QVA 826-33 (1833 QCVA), wherein the chief mate, Phillip Middleyard, struck the claimant mariner, David Clarke, with an iron "belaying pin", designed to attach the ropes of the sails, causing severe head injuries. The dispute began over the role of boys on board, and whether they were supposed to serve meals to the mariners. Middleyard was deposed and, as

Violence could also be inflicted by the crew on passengers and among passengers themselves. In *The City of Rochester*,[898] the claimants, John and Mary King and their daughter Ann boarded the vessel at Liverpool, bound for Quebec City. Following a quarrel with another passenger named Macelesfield who had "sat on a chest and put his hand in upon" their daughter while she was in bed, the passenger and the claimant, John King, had struggled, and the claimant had hit Macelesfield with an oak "strong back" staff. Later that morning, Macelesfield, accompanied by

expected, blamed the claimant for attacking the master. He stated that he took the pin in hand in case the claimant continued beating the master but had not used it. The claimant was successful in obtaining damages before Francis Ward Primrose, sitting as a deputy judge in Kerr's absence.

[896] In *The Concord*, QVA 843-34 (1834 QCVA), the claimant, Thomas McLachlin, was not aroused for his watch, not being allowed, allegedly for reasons of limited personal hygiene, to sleep with the other crew members. He was awoken and struck by the master, Patrick O'Donell, with a rope's end. Having lost the rope's end in the dark, the master continued beating the claimant with the claimant's shoes.

[897] In *The Fanny*, QVA 720-32 (1832 QCVA), the master, Thomas Bowser, who had hired a reduced crew of six able seamen and five boys, instead of the usual sixteen men, had difficulty getting the crew, on strike due to long work hours and a food shortage, to bend, i.e. fasten, the sails to the yards. He ordered the claimant mariner, William Edgar, to get on deck to help bend the sails. The claimant refused, protesting that he was unable to walk due to leg problems, although testimony later established that he was dancing with the passengers before and after the event that led to the suit. That event was that the master, not getting a reaction from the claimant, pulled out a pistol and shot at the claimant, a bullet wounding him in the shoulder. The master, seen shortly thereafter smiling on deck, apparently pleased with himself, replied that the claimant had, three days earlier, come into the master's cabin and had struck the master over the head with an "iron cross piece pin", rendering the master unable to work in the interval. The evidence in fact established that the pin was made of mahogany. In a decision reported in the August 14, 1832 edition of the *Quebec Mercury*, Justice Kerr was unable to determine who had started the struggle during which the master was hit with the pin, but had no difficulty in finding the master's intervention with the pistol to be exaggerated. He awarded Edgar his wages plus £40 in damages. It is noteworthy that due to the crew problems, some of the passengers, including James Cassidy, were asked to assist in bending the sails. Cassidy expected to be compensated, and had been promised wages by Captain Bowser. Not being paid, he filed his own suit in *The Fanny*, QVA 712-32 (1832 QCVA). The remaining crew members intervened, alleging that Captain Bowser had not only shot Edgar, but had threatened to shoot the marshal and registrar of the vice-admiralty court. Fearing for their lives, and hoping to find a better ship, the crew sought their discharge. The case was settled. In another case, *The Brilliant*, QVA 616-30 (1830 QCVA), the claimant passenger, John White, persuaded the master, John Linkin, not to shoot another passenger. In yet another case, *The Herald*, QVA 725-32 (1832 QCVA), during the crossing of the passenger vessel from Belfast to Quebec City, the master and mate, calling themselves Orangemen, fired pistols over the passengers' heads. See also *The Bolivar*, QVA 799-33 (1833 QCVA), where the claimant seaman, James McAnally, alleges that he was shot by the master, George McMahon. In *The Wezer*, QVA 893-34 (1834 QCVA), the master, William Taylor, attempted to shoot a passenger, William Farris. Pistols could be handily used with other arms. In a suit involving an inappropriately named ship and master, *The Patience*, QVA 273-22 (1822 QCVA), the claimant mariner, Francis Conroy, alleges that the master, Thomas De Bowman, shot at him and several other crew members and ran after the claimant wielding a sword. In *The Nancy*, QVA 298-23 (1823 QCVA), the three claimant mariners were prevented from returning on board by a guard armed with a blunderbuss posted at the gangway by the master, Thomas Ross. Another master, Simpson Bragg, pointed a blunderbuss at the claimant mariner, Lewis Francis, in *The Bows*, QVA 407-26 (1826 QCVA), and pulled the trigger "when fortunately it snapped and did not go off". In *The Ranger*, QVA 300-23 (1823 QCVA), the claimant mariners were confined in a hold and then ordered to return to work by the master, Robert Carter, who held a loaded pistol in each hand. In *The Isabella*, QVA 396-26 (1826 QCVA), the chief mate, Walter Gilly, brandished a pistol in each hand while confronting the claimant mariners. Finally, see *The Coldstream*, and the text accompanying note 938 below, where pistols were very present.

[898] *The City of Rochester*, QVA 728-32 (1832 QCVA).

at least three other passengers, as well as the defendant chief and second mates, went to the breakfast area all armed with sticks, and severely beat both claimants, and their daughter. Some of the mariners attempted to assist the claimants, but at least one was struck by the chief mate and ordered on deck. The chief mate was described as striking the claimants more enthusiastically than the others.

The master, James Riches, hearing the ruckus, came in with the steward, who had a sword in hand, and stopped the attack. However, evidence was led confirming that the master was in fact behind the attack, and had prevented others from interfering on behalf of the claimants. Following an earlier event, involving a boy stealing a pudding and traces of the pudding found in the "kid" or tub out of which the seamen ate, the master had disciplined half a dozen English mariners for protecting the boy from punishment, by confining them and reducing their rations.

But Captain Riches had in the meantime learned that the Kings were secretly providing food to the men being punished, the same men who later came to assist the claimants. The other mariners on board were Italian nationals, as the Navigation Acts did not apply to passenger vessels. All the mariners were armed with knives and, on any account, the atmosphere on board was one of armed response. The claimants obtained the arrest of the master and the chief and second mates. The vice-admiralty judge upheld the claim, ordering the master, chief officer and second officer to pay £20 to the claimants plus £25 in expenses. The defendants appealed, but nothing more appears in the records of the Quebec Vice-Admiralty Court or in those of the High Court of Admiralty.

Interfering in quarrels on board could give rise to further violence. In *The Waterloo*,[899] a fight broke out between two passengers when one accused the other of having blacked his face with soot. In reality, it was the master who told a crew member to black the passenger's face when he wasn't looking. The master, George Smith, instead of stopping the ensuing fight, told the belligerents to move to a more open deck area to be better able to strike each other more forcefully. When they did not move, he started hitting one of the two. The claimant by-standing passenger, William Rome, commented that to hit only one wasn't fair. The master then called the

[899] *The Waterloo*, QVA 739-32 (1832 QCVA). Captain Smith was also accused of assault against Edward Laughton, another passenger, in *The Waterloo*, QVA 745-32 (1832 QCVA).

claimant a "damned west-country bugger" and started hitting him, only stopping when the chief mate intervened. Rome obtained the arrest of the master, but the outcome of the suit is not in the record.

But violence could also be psychological. In many cases, the master demoted an officer to the rank of general seaman, often called "being sent before the mast", referring to the fact that the master and officers had their quarters in the aft section of the ship, whereas ordinary seamen were confined to the forward quarters. Further, with or without being beaten, seamen were often confined to cargo holds for hours or even days without food or water and were subject to being sent to the highest points of the rigging and ordered to stay there for hours on end. The slightest slip and fall would necessarily be fatal.[900]

In *The Margaret Johnston*,[901] the master of a passenger ship, Henry Sawarby, ordered the claimant mariner, Hugh Brisland, to be stripped of all his clothing and beaten naked before the crew and passengers. Luckily for the claimant, the protestations of the passengers resulted in the claimant being released from this unpleasant predicament. Upon arrival in Quebec, Brisland had the master arrested, but the record does not indicate the result of the proceedings.

Violence on board often resulted from poor living conditions. Confining a mariner without food or water as an act of discipline could be an act of violence. As could refusing to allow food to be given to a sick mariner, or otherwise making his life difficult. In *The Euphemia*,[902] the master, Thomas Willdrige, considering the claimant mariner, Robert Dewar, to be "shamming" sickness, refused to allow the claimant to be taken to hospital in Gilbralter and preferred he be retained on board to save costs.

Thereafter, Dewar was given no food for four weeks as he lay below, unable to work. Some of the crew brought him food and so the master ordered all meals to be served on deck to avoid smuggling. To make matter worse, the master had a "gimblet hole" cut in the ship's main deck immediately above the claimant's hammock so that rainwater and the crew's urine would fall on the claimant. Water was poured down the hole as well. In order to avoid receiving this on his

[900] In *The Agnes and Ann*, QVA 642-31 (1831 QCVA), the claimant, James Barrington, was sent by the master, John Martin, to the royal head mast for eight hours during a severe gale.
[901] *The Margaret Johnston*, QVA 647-31 (1831 QCVA).
[902] *The Euphemia*, QVA 765-33 (1833 QCVA).

face, the claimant had to lie on his chest. To make matters even worse again, the master ordered the steward to rub tar over the claimant's face, mouth and nose. Buckets of water were thrown on the claimant at various times.

Dewar obtained the arrest of the master. The depositions of the crew given in defence were evasive. The steward admitted having "varnished" the face of the claimant in his sleep, and having thrown a bucket of water on him "by way of a joke", but insisted the master was "very kind" to the claimant. The depositions of the crew given on behalf of the claimant confirmed his version of affairs, and a Quebec doctor testified that the claimant was very ill indeed. The record ends with the depositions and does not indicate whether the claimant survived until judgment or what judgment was handed down.

Violence could also involve preventing a claimant from filing a claim by laying charges of desertion whenever he attempted to consult a proctor. In *The Sarah Fleming*,[903] the claimant mariner, John Cain, was ill-treated by the master, Edward Starks, and went on shore with a bundle of clothes, but in reality to meet Samuel Ussher, a prominent Quebec proctor, to file a claim. Ussher wrote to the master that afternoon. Upon trying to hail the ship to send a boat for him, the claimant got no answer, but later met the master in town, who mentioned the letter and asked to meet the claimant at Mr. Ussher's offices that afternoon. As might be expected, the master arranged to have the claimant arrested for desertion just prior to arriving at Mr. Ussher's offices.

A jail term with hard labour was the common punishment for desertion by a seafarer.[904] In John Cain's case, both Mr. Ussher and the master were allowed to provide personal answers to the interrogatories of counsel.[905] Obviously, the master alleged disobedience and desertion and denied any ill-treatment. The record ends with the depositions and the claimant in jail. The vessel

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903 *The Sarah Fleming*, QVA 791-33 (1833 QCVA). See also *The Prince George*, QVA 827-33 (1833 QCVA), where the claimant, Alexander Mackay, was beaten and, upon arrival in Quebec City, expelled from the ship. He took suit agaist the master, Thomas Morrison, who then had his men physically seize the claimant and confine him on board.

904 There were a series of enactments prohibiting desertion. At the time of the creation of the Quebec Vice-Admiralty Court, the *Merchant Seamen Act, 1728* (U.K.), 2 Geo. II, c. 36 provided for the forfeiture of wages of deserters, and empowered any justice of the peace to imprison a deserting mariner for 14 to 30 days. The prison term was set at 20 days under provincial legislation, and was later extended to 30 days under Imperial legislation. See the text accompanying note 959 below.

905 The rule preventing any party interested in the outcome of a suit from testifying was still in force

may have sailed, and the bill of costs of Stuart & Black, proctors for the master, infers that the suit may have been dismissed consequently.

Suits involving Violence against Women

Although not often alleged in the records of the Quebec Vice-Admiralty Court, violence could also be against women. In *The Earl of Aberdeen*,[906] the claimant passenger, Mary Ann Wilson, along with her mother and sister sailed from Belfast to Quebec City. During the voyage she was attacked and beaten by Anne Boyle, wife of the master William Boyle. Upon arrival, she filed suit in order to obtain the arrest of the master and of his wife. However, the suit was either settled quickly, or the defendants found to have left town, as the backsheet of the summary petition indicates that the warrant was not given to the marshal for service.

In *The Heath*,[907] the claimant passenger, James Clark, his wife and daughter sailed from London for Montreal but disembarked in Quebec City, unable to continue with the ship. The master, William Donkin, had refused to allow any provisions to be given to Clark's daughter, and provided the poorest of provisions at all times. When the claimant complained, the master threatened to "blow his brains out" and throughout the voyage showed the vilest disregard for his wife, calling her a whore, spitting and blowing his nose in her face, and threatening on more than one occasion to throw her child overboard. Clark obtained the arrest of the master upon arrival in Quebec City. The record does not include a decree, but the bill of costs of the defendant suggest that the suit was not successful.

In *The Pomona*,[908] the claimant passenger, Sarah Brown, was dragged from the cook house by the master, John Stevens, and thrown down the hold when she refused to go of her own will. The master pleaded that she was drunk with the cook and steward, also drunk, when she refused to leave the cook house and to go below. The record goes no further.

Violence against women could also be of a sexual nature. In *The Agnes*,[909] the claimant passenger, Catherine O'Brian, along with her family, paid for passage from Quebec City to

[906] *The Earl of Aberdeen*, QVA 699-31 (1831 QCVA).
[907] *The Heath*, QVA 713-32 (1832 QCVA).
[908] *The Pomona*, QVA 851-34 (1834 QCVA).
[909] *The Agnes*, QVA 623-30 (1830 QCVA).

Limerick in Ireland. No sooner had the voyage commenced that the master, Timothy Gorman, assaulted and attempted to ravish the claimant and, meeting resistance, defamed her in front of the other passengers. She and her family disembarked before leaving the St. Lawrence, and she claimed the lost passage money as well as damages totalling £500. The master was arrested and the vice-admiralty judge set security at £100. The following day, the matter was quietly settled by the master.

In *The Janes*,[910] the claimant passenger, Ellen Dunn, avows the weakness of her nature, and the situation of power in which was placed the master, John Saul, as an explanation for her being begotten with his child following his solemn promise of marriage during a voyage from Dumfries Scotland to Quebec City. She obtained a warrant for the arrest of the master, but the record does not indicate whether the child ever got to meet its father, or receive financial support.

Suits involving Passenger Vessels

Courts of vice-admiralty also heard disputes arising on passenger vessels. Passengers could encounter difficult conditions on board passenger vessels, including poor living conditions and a lack of supplies, often caused by overcrowding, which led to the enactment of the 1817 *Passengers Act*.[911] The legislation obliged the master and owner of a vessel carrying passengers from the United Kingdom to what was to become Canada, to prepare a list of passengers to be checked upon departure and upon arrival by Customs officials, in order to avoid overloading vessels. A bond had to be provided in the port of departure and for every passenger beyond the number allowed, an amount of £50 would be forfeited. The Act set the limit at one adult or three children under the age of 14 years for every ton and a half of the ship's register tonnage, or, where cargo was also carried, for each ton and a half remaining unladen. The Act also required 12 weeks of supplies in food and water for the passengers.

But the Act was not always respected. In *The William of Dublin*,[912] the vessel sailed from Dublin to Quebec in an overloaded condition. Her register tonnage was 93 tons, and she carried six tons of merchandise, leaving only 87 tons for the calculation of passengers. That would have allowed for the equivalent of 58 adult passengers, but there were at least 93 adults and 45 children on

910 *The Janes*, QVA 884-34 (1834 QCVA).
911 *Passengers Act*, 1817 (U.K.), 57 Geo. III, c. 10.
912 *The William of Dublin*, QVA 319-23, Stu. K.B. 163 (1823 QCVA).

board when she arrived in Quebec City, the equivalent of 50 adult passengers more than the statutory limit.[913]

The master, William Norris, did not appear before the court, nor did he send his proctor. The court decided it had concurrent jurisdiction with the criminal courts of sessions for questions of statutory forfeiture and, condemning the "vile passion of avarice" displayed by Norris, forfeited the sum of £2,500, to be paid one half to the Crown and one half to the informant Customs officer. However, a note of the reporter of the vice-admiralty decision reveals that the decision was struck down by an unreported decision of the Quebec Court of King's Bench, finding that the Quebec Vice-Admiralty Court had no jurisdiction.

Where supplies were short, passengers could be subjected to extortion. In *The Nelson*,[914] the claimant passenger, William Hughes, alleged that the master, Thomas Burnett, had taken on more than 100 passengers beyond the limit applicable under the legislation. Consequently, the provisions taken on board were insufficient, and water especially scarce. The master thereafter sold provisions at disproportionate prices and requested a "fire attendant" fee or tax from all passengers.

Another suit involving the same voyage of the *Nelson*,[915] reveals that the number of passengers on board was more than 370, although the legal limit for the vessel was 183. The voyage from Killala in Ireland to Quebec City took 115 days, three weeks of which were spent in St. John's harbour where the little money the passengers had was quickly depleted in exchange for provisions. The claimant passenger in the latter suit, Patrick Ward, was refused water for six weeks, and had to beg from other passengers, due to his inability to pay the fire tax. Upon arrival in Quebec, he obtained a warrant for the master's arrest, but the marshal endorsed the warrant, stating that the master could not be found, and was probably concealed on board the vessel.

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913 The testimony of John Fife, tide waiter in Quebec, was that he counted 96 adults and 45 children. The master provided a list of passengers that was not official and was incomplete. He said he had no other. The master further admitted that 11 other children had died during the voyage. Three families had to sleep in one of the long boats on deck, such were the conditions cramped. One witness, James Hunt, a weaver, boarded with his pregnant wife and their 12-month old baby. They had no berth and slept on deck. The baby died and a sibling was born during the crossing.

914 *The Nelson*, QVA 662-31 (1831 QCVA).

915 *The Nelson*, QVA 696-31 (1831 QCVA).

A similar scheme of less than scrupulous ship masters was the capitation tax. There was no applicable tax of that name in Quebec, but in 1834 there were a large number of cases against a number of vessels where the passage money had been paid, but the masters told the passengers that an additional rating per head or per family was required to be paid prior to disembarking.[916] Probably the passengers then learned that there was no such tax, and many were able to issue suit prior to the vessel leaving the port.

Passengers could find themselves in an unexpected accommodation or location due to the behaviour of the owner, master and crew. But the crews could also be inconvenienced due to the behaviour of the passengers. In *The Irton*,[917] a wage case, the three claimant seamen, sent ashore in Quebec City for refusing to work on a voyage from Ireland, complained that the passengers were interfering with their natural rest and sleep. They alleged that the Irish passengers, 60 to 80 in number, behaved themselves in a noisy and riotous manner each night, singing while dancing in lines, and banging their heels on the main deck, to midnight and beyond.

Passengers sometimes had to assist the crews in the navigation of the vessel. In *The Fanny*,[918] a scaled-down crew resulted in at least one paying passenger, James Cassidy, having to work as a mariner and, although promised payment, having to arrest the vessel to obtain compensation. In *The Atlantic*,[919] the illness of several crew members led to the master, Dougald MacFarlane, promising to remunerate passengers for replacing the crew but, once more, the passengers were obliged to arrest the vessel in an attempt to hold the master to his promise.

In *The Jane*,[920] the claimant passenger, William Doyle, was obliged by the master, Michael Burke, to work as a mariner throughout the voyage. Upon arriving in Quebec, the master promised to pay the claimant "the highest wages given in Quebec" if he replaced the chief mate who was sent to the hospital. No payment was forthcoming, and Doyle had the vessel arrested.

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916 The first case in the records appears to be *The Westmoreland*, QVA 845-34 (1834 QCVA). The usual defence was to contest jurisdiction of the vice-admiralty, by filing the then new act on protest procedure of the 1832 Rules. See *supra*, note 488, and the text accompanying note 514 above. The defence does not appear to have ever been successful.

917 *The Irton*, QVA 901-34 (1834 QCVA).

918 *The Fanny*, QVA 712-32 (1832 QCVA), and QVA 720-32 (1832 QCVA). For more on the infamous *Fanny*, see *supra*, note 897.

919 *The Atlantic*, QVA 607-30 (1830 QCVA).

920 *The Jane*, QVA 656-31 (1831 QCVA).

The suit was settled quickly. A similar suit, *The Betock*,[921] involved the claim of a passenger, Daniel Murphy, asked to serve as cook by the master, Alexander Hunter. The service only lasted for one half of the voyage due to the claimant developing a sore arm, but the master refused to remunerate. Murphy arrested the vessel and obtained judgment by default. No stipulation or bail appears in the record, and the vessel may have sailed while under arrest.

In an earlier voyage of the *Jane*,[922] the claimant passenger, Thomas Fitzpatrick, boarded the vessel in Belfast with his goods and effects, bound for Quebec. He was dismayed to find that the then master, Alexander McLean, spent the better part of his time intoxicated and in the company of women of questionable moral character, to such an extent that off the coast of Newfoundland the chief mate, the second mate, the carpenter and two mariners abandoned the vessel, fearing for their lives at the hands of the master. The claimant left the vessel as well, and found himself in an uninhabited part of Newfoundland for an entire day before a fishing boat picked him up. In the meantime, the *Jane* had continued on her voyage, taking with her the claimant's belongings. The claimant was able to reach Quebec before the *Jane* had again sailed, and obtained a warrant for the arrest of the vessel, claiming his belongings. The record ends with the list of items claimed.

In *The Brilliant*,[923] the claimant passenger, James O'Hea, alleges that due to the shortage of food on board and the starving state of the passengers, the master, John Linkin, asked the claimant, as a trustworthy person, to disembark on the Gaspé Peninsula, in order to procure food for the continuation of the voyage to Quebec City. However, once on shore, the vessel sailed without waiting, taking the claimant's possessions and leaving the claimant "destitute and friendless in a strange land". The record contains a release signed by the master, the claimant and several other passengers. The master therein states that he sent three passengers on shore "out of humanity" to obtain food. The other signing passengers must have followed without the master's benediction.

It is unclear why O'Hea would sign the release and then file suit *in rem* against the *Brilliant* the day following his signature, but he had only acknowledged receiving ten shillings in the release,

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921 *The Betock*, QVA 695-31 (1831 QCVA). See also *The Alchymist*, QVA 737-32 (1832 QCVA), *The Harvey*, QVA 788-33 (1833 QCVA) and *The Rosella*, QVA 808-33 (1833 QCVA).

922 *The Jane*, QVA 552-29 (1829 QCVA).

923 *The Brilliant*, QVA 609-30 (1830 QCVA).

which might have been the cost of catching up with the *Brilliant* in Quebec City. His vice-admiralty suit was solely for his belongings, which the master refused to restore, and for which the Quebec Vice-Admiralty Court awards him £20 in damages.

A second case involving the *Brilliant* and Captain Linkin was initiated by another passenger, James White, who did not sign the release.[924] White, a medical practitioner, claimed that he and the master had agreed to set the price of his passage in the cabin when "the bustle of departure was over". In fact, the claimant rendered medical services to the master, lent him money, and prevented him from shooting a passenger,[925] but never settled the amount to be paid for the passage. After the shooting episode, the master took a dislike to the claimant and put him out of the cabin. On the same day as the other passengers were sent ashore, White alleges that the master went ashore in his own boat, but immediately returned to the *Brilliant* and set sail leaving the claimant behind. White was able to hire a boat and catch up with the *Brilliant*, and obtained the arrest of the master in a suit for damages. The decree of the court is not in the record, but a bill of costs in favour of the master would suggest that the claimant failed, perhaps due to never having paid passage money.

In *The William and James*,[926] the claimant passenger, Connor Halpin, along with other members of his family, boarded the vessel in Ireland bound for St. Andrews in New Brunswick. Instead, the owner, William Birnie, had the vessel brought to Quebec City, where the claimant and his family were unceremoniously disembarked, without any arrangements being made to get them to St. Andrews. They found themselves obliged to arrest the vessel in an attempt to fund their travel to New Brunswick. The suit was quietly settled.

In *The Dominica*,[927] the claimant passenger, Murty Sullivan, along with another passenger, was asked by the owner, John Cummings, also on board, while hundreds of miles below Quebec City, to row him to shore. The passengers got into the boat alongside the ship, but instead of joining them, the owner cut the boat loose and, notwithstanding their cries for assistance, the master, Henry Bowman, proceeded on the voyage leaving them behind. The two men finally

924 *The Brilliant*, QVA 616-30 (1830 QCVA).
925 See note 897 above.
926 *The William and James*, QVA 557-29 (1829 QCVA).
927 *The Dominica*, QVA 742-32 (1832 QCVA).

made shore and the claimant got to Quebec in time to catch up to the owner and master. However, for undisclosed reasons, Sullivan's proctor, Samuel Ussher, had the owner and master cited to appear, but did not obtain warrants for their arrest. The record indicates that when came the time to serve the defendants, they could not be found, the vessel having most likely sailed, again leaving the passengers behind.

In *The Margaret*,[928] another case involving a boat, the claimant passenger, Robert Kelly, sailed from Quebec City to Restigouche. In the Bay of Chaleurs, the claimant obtained the master's permission to take the vessel's boat to get provisions. The crew brought the boat fitted with oars and the claimant and another passenger rowed off. However, when they got within a few yards of the shore, they were called back to the ship. Upon their return alongside, the master, Hilary Michaud, boarded the boat and began beating the claimant. Apparently, the master wanted his men to row the claimant ashore and to return with the boat. Kelly had the master arrested, and was successful in obtaining damages.

In *The Belleisle*,[929] the claimant passenger, Margaret Liddle, booked passage from Montreal to Plymouth. Told by the chief mate to come on board the following day, she was surprised to find the ship had sailed prior to her arrival in the port. Undaunted, the claimant made her way to Quebec where she found the *Belleisle*. She requested to board, but the master, William Harrison, refused, much as he refused to refund the price she had paid plus her expenses to reach Quebec from Montreal. The vessel was arrested, but the outcome of the claim is not in the record.

In *The Lund*,[930] the claimant passenger, Robert Hawke and his family, including a daughter 15 years of age, had hired space in the cabin of the vessel, instead of in the less luxurious steerage compartment. During the voyage, the master, Mathias Spedding, introduced two women steerage passengers "of highly improper character" into the cabin with the claimant and his family. The claimant's complaints led to his family being turned out to the cabin altogether. Upon arrival, Hawke had the master arrested. The court ordered the master to pay £25 in compensation to the claimant.

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928 *The Margaret*, QVA 829-33 (1833 QCVA). Kelly seems to have developed a penchant for suffering violence. See *The Percival*, QVA 534-28 (1828 QCVA), *supra*, note 890.

929 *The Belleisle*, QVA 943-34 (1834 QCVA).

930 *The Lund*, QVA 613-30 (1830 QCVA).

To add insult to injury, passengers could also then, as now, lose their baggage and belongings due to an error of the carrier. In *The Kingston*,[931] the claimant passenger, Thomas Ardagh, went on board and consigned his belongings in a trunk, including a money box, to the chief mate. He was later told that he would need more provisions for the crossing and went on shore to procure them. Upon his return the following morning, he learned that the *Kingston* had sailed. He was able to get on the next ship, and to arrive in Quebec before the re-departure of the *Kingston*, only then to learn from her master, Robert Fleck, that his belongings had been given to another. Losses could also be intentional. In *The Speculator*,[932] the master, Thomas Brehaut, ordered the bedding and linen belonging to the claimant passenger, Mathew Donaghue, to be thrown overboard.

Following upon the cholera epidemics of the 1820s, the Quebec government set up in 1832 a quarantine station on Grosse Île for passengers coming to Quebec. During the first navigating seasons, losing baggage was common for passengers disembarking at the station. Several claims are documented in the records of the Quebec Vice-Admiralty Court.[933] Of interest in these cases are the detailed lists of the belongings of these mostly Irish immigrant families, coming to America with all their worldly possessions.

Suits involving Discipline on Board

One category of case before the vice-admiralty courts which combined questions of violence and authority, is the corporal punishment inflicted on mariners by masters. There are several cases of corporal punishment in the records of the Quebec Vice-Admiralty Court, including deprivation of food and water and confinement in irons, but perhaps the best illustration of acceptable practices can be derived from a review of a few cases involving punishment by flogging.

Flogging had been only one of the punishments that were common on navy ships at the beginning of the period under review. The others ranged from caning, to running the gauntlet, to

931 *The Kingston*, QVA 641-31 (1831 QCVA). See also *The Mint*, QVA 664-31 (1831 QCVA), where the claimant passenger, Patrick Kennedy, missed the sailing from London to Quebec, but was able to arrive on another vessel, the *General Hewitt*, prior to the re-departure of the *Min*t. Her master, William Boyle, promised to make things right, but in fact had previously broken into the claimant's trunk and was auctioning his belongings.

932 *The Speculator*, QVA 654-31 (1831 QCVA).

933 See *The Lancaster*, QVA 757-33 and QVA 758-33 (1833 QCVA), *The Cottingham*, QVA 865-34, QVA 866-34, QVA 877-34, QVA OO^2-34 and QVA 882-34 (1834 QCVA).

being hanged from a yardarm. But in the merchant marine, flogging was the ultimate corporal punishment and remained popular long after its use had been suspended in the British navy.[934]

Flogging was at the discretion of the master, and was seen as a way of maintaining discipline on board ship.[935] In *The Ajax*,[936] the claimant passenger, Thomas Connor, was suspected of stealing potatoes from one of the families on the ship, carrying more than 300 Irish passengers. The passengers had been warned by the second mate upon boarding, that any offence would be punished by the decision of the passengers themselves. A jury was formed and found Connor guilty. He was sentenced to confinement and a fine, but broke loose from the irons. The master, Richard Sims, then asked the passengers what should be done and they requested Connor be flogged with a cat o' nine tails "composed of sundry doubles of a lag line", and then confined in the jolly boat, slung behind the stern of the vessel. Upon arrival in Quebec, Connor issued suit in the vice-admiralty, claiming damages against Sims and obtaining his arrest. The file contains depositions of witnesses, but the final outcome of the suit is not recorded.

In *The Barosa*,[937] the claimant mariner, John Rowlins, sought damages for having been subjected to five dozen lashes during a voyage to China and then Quebec City. He alleged that while in Canton, he had obtained permission, during the master's absence on shore, to bring on board certain acquaintances and that they were drinking. A fight with other crew members ensued. In his reply, the master, Orlando Wilson, pointed out that the claimant had omitted to say that one of the crew, confined by the chief mate for fighting, had been released by the claimant and that

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934 Flogging in the British navy had been reduced to a maximum of 12 lashes with a cat o' nine tails prior to being suspended as punishment in time of war in 1806 and in peacetime in 1881. It was only finally removed from the punishment manuals in 1906. In the United States navy it was also restricted to 12 lashes by a regulation of the 13 colonies in 1775. Flogging caught the public eye with nineteenth-century publications, including Herman Melville's novel *White Jacket*, describing flogging in the United States navy. Flogging on American ships was outlawed altogether by an Act of Congress, entitled *An Act making Appropriations for the Naval Service for the Year ending the thirtieth of June, one thousand eight hundred and fifty-one*, passed September 28, 1850, c. 80, 9 Stat. 513, at 515, where it was enacted, "That flogging in the navy, and on board vessels of commerce, be, and the same is hereby, abolished from and after the passing of this Act."

935 Flogging was to be done over the person's back, while stripped to the waist, but was not always done according to the rules, as has been seen. In *The Sir James Kempt*, *supra*, note 884, John Bowen was flogged naked, but the master said it was dark and he did not notice what Bowen was or was not wearing. In the same case, John Walker was held over the windlass, also in a state of undress, and flogged by the master and the owner. In *The William Money*, *supra*, note 880, the master was accused of unreasonable punishment with the removal of the claimant's jacket in a gale and the use of a "pickle-toby" for whipping.

936 *The Ajax*, QVA 714-31 (1831 QCVA).

937 *The Barosa*, QVA 773-33 (1833 QCVA).

the master, coming back on board, reported the incident to the commodore of the fleet on a nearby vessel, soliciting his assistance.

The commodore ordered Rowlins to be taken on board the commodore's vessel and other crew members of the *Barosa* to be placed in irons. The select committee at Canton, which had jurisdiction over ships in the employ of the East India Company, formed a court of inquiry. Following a week of confinement, Rowlins was brought back on board the *Barosa* to be tried before the committee, and was sentenced to 60 lashes. He apparently only suffered 36 lashes according to his libel, filed upon arrival in Quebec. Rowlins obtained the arrest of the master in a suit in damages for assault. The vice-admiralty record does not indicate the outcome, but the master's proctors moved for dismissal and were most probably successful.

In *The Coldstream*,[938] the claimant mariner, William War, was given three dozen lashes on board the ship for mutinous activity. The ship's log and the court record indicate that late at night while nearing Newfoundland en route for Quebec City, the crew was sent aloft to furl, or roll up, the foresail in a gale, to reduce the effect of the wind on the sail. They were unable to do so, and requested the chief mate, Henry Taylor, to keep the ship away from the wind a little, to reduce the pressure on the sails. The chief mate, through a speaking trumpet, refused, calling the men "a set of soldiers", insinuating that they were no sailors. The men then came down from the rigging, stating they could not furl without assistance. The mate "sent his compliments" to the master, William Hall, who was in bed and who then arrived, pistols in hand, calling the men a "mutinous set of blackguards", and threatening to shoot the first man who would return below to his quarters without furling the sail. The claimant then asked the master "who would shoot the second man." The chief mate then pulled out his own pistol and threatened to kill the claimant, and the master ordered the claimant put in irons.

The following day the master conferred with the mates and then summoned Mr. War and informed him that he would be flogged. War refused to remove his shirt, and the master, wielding a sword, took hold of him and had the men remove his shirt. As was the tradition in the navy, the claimant's hands and feet were then tied to a grating rigged for the purpose to "Jacob's

[938] *The Coldstream*, QVA 750-32, Stu. K.B. 518 (1832 QCVA). For another furling case, see *The William Money*, QVA 925-34 (1834 QCVA), *supra*, note 879.

ladder", the rigging ladder used to climb the mast on the quarter deck. The master then drew a line with his sword on the ship's deck forward of the claimant, and said he would shoot any man that came aft of the line. There was at the time a crew of 60 men on board. The boatswain, whose job it was to maintain order on board, was told to flog War three dozen times.[939] The master complained, after 11 lashes, that the boatswain was not flogging hard enough, and the chief officer then took over "in a most famous and unbecoming manner", and administered 24 additional lashes. War obtained the arrest of the master and the chief mate. In answer, the defendants pleaded that, for the preservation of discipline and order on board, they had by necessity to cause the claimant "to be a little flogged".

In the Quebec Vice-Admiralty Court, Justice Kerr found the evidence contradictory, but relied on recent caselaw of Lord Stowell to support the view that the master of a merchant ship had the authority to punish the mariners in a reasonable manner, including by flogging, where appropriate.[940] As one of those cases,[941] involving a punishment of 36 lashes given to a mariner by the master after consultation of the other mates for being insolent to one of the mates, was upheld by Stowell as reasonable punishment, it is not difficult to understand why Mr. War's claim for his being flogged on the *Coldstream* was equally doubtful. Kerr considered War to be a "mover of sedition" and his punishment was "absolutely necessary for the preservation of the whole concern."[942] The judge found the punishment reasonable in the circumstances, and that the chief officer and master had performed their duties. War's suit was dismissed.

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939 The chief boatswain, Benjamin Goddard, testified that he had personally flogged "many a hundred men" during his time with the British navy and the American navy. However, on the day of War's flogging, he was ill and the acting boatswain, Robert Murray, who had never flogged anyone, was told by the master to do it or he would himself suffer a beating.

940 Kerr refers in his reasons to *The Agincourt* (1824), 1 Hag. Ad. 271, 166 E.R. 96 (Adm.) and to *The Lowther Castle* (1825), 1 Hag. Ad. 384, 166 E.R. 137 (Adm.). Both cases refer to the first edition of Charles Abbot, *A Treatise on the Law relating to Merchant Ships and Seamen* (London: Butterworths, 1802), at pages 125 *et seq*, which in turn refers to the Ordinnance of 1681, Book II, Title I, art. 22, and to article 12 of the *Rolls of Oleron*. The best version of the latter medieval French text is the compiled version prepared by James Shephard in 1985 as part of his doctoral thesis in the University of Poitiers, entitled *Les Rôles d'Oléron: Étude des Manuscrits et Édition du texte*. Article 12 states that the master may discipline a mariner and that the mariner is not to respond to the first blow given by his master. It also states that if a mariner strikes his master, he may lose his hand.

941 *The Lowther Castle*, *ibid*.

942 *The Coldstream*, *supra*, note 938, reasons for judgment at page 523.

Suits involving Wage Disputes

During the period under review, wage claims were the mainstay of the vice-admiralty courts in the British Empire, and of the High Court of Admiralty.[943] However, although the London court clearly had jurisdiction over wage claims, wage claims before the Quebec Vice-Admiralty Court virtually all arose due to some difficulty encountered during the voyage, leading the claimant mariner to seek his discharge from the ship and his wages.

As previously noted, mariner contracts were out and back in those times, and virtually all voyages to Quebec began in the United Kingdom. The mariners expected to be paid upon discharge, upon the ship's return. Once the ship arrived back in the United Kingdom and discharged her return cargo, the mariners were discharged of their duties and entitled to their pay. From the number of wage claims before the High Court of Admiralty, it is obvious that problems getting paid were legion. And the High Court could of course hear evidence of ill-treatment or loss of belongings where a mariner made a claim for damages beyond his wages, much as in Quebec.

However, the High Court of Admiralty would not be asked to discharge the mariners as frequently as would the Quebec Vice-Admiralty Court, because discharge after the return of the ship to the United Kingdom was as of right, whereas in Quebec it was a discretionary remedy. As previously explained, in order to invoke a remedy of discharge prior to the natural termination of the contract, the mariner had to lead evidence before the vice-admiralty in Quebec of illness, injury or of some situation demonstrating that the obligations of the ship, owner or master were not being respected.

As concerns illness and injury, there are numerous cases where a mariner is admitted to the Hôtel-Dieu Hospital in Quebec City. The master, as the shipowner's representative, had to pay for medical treatment, and there are many cases where the ship sailed, leaving the mariner in hospital without financial assistance. There are also many cases where admission to hospital was denied by the master, leaving the suffering mariner to his own devices in Quebec. It is

[943] Of the more than 3,000 cases reviewed in the records of the Quebec Vice-Admiralty Court from 1764 to Confederation, over ⅔ involved wage claims. Of the more than 11,000 High Court of Admiralty cases entered in the records of the High Court of Admiralty from 1700, more than ½ involved wage claims and the portion might be closer to ⅔ given that as many as 1,000 of the earlier entries are opaque as to what was being claimed.

impossible to know how many others were kept on board, unable to take suit, and who may not have survived the lack of medical attention. Once passenger ships started coming with hundreds of individuals on board, ship compliments often included a medical doctor.

As to the breach of obligations of the master, owner or crew as a reason for discharge, the question of violence on board has already been canvassed. With the number of cases brought before the court, it is impossible to provide details of all types of complaint made. However, living conditions on board were frequently used as an excuse to be discharged. These included the quantity and quality of food and water. Suits for discharge were made complaining about rations of "the worst of victuals, consisting of condemned, damaged beef and meazly pork, and that in small quantities, which the crew were frequently obliged to throw overboard",[944] about a crew that "had nothing to eat but bad meat and in such a small quantity that, far from being enough to support eight persons forming part of the crew of the said brig, there was scarcely enough to support three",[945] about being "fed with unwholesome provisions consisting of beef and pork such as rotten meat, so much so that your petitioners being at sea refused to eat it",[946] or being served "bread or biscuit of such a disagreeable and unwholesome description, being filthy, decayed, mouldy and maggoty so as to be extremely distasteful and unfit for food", accompanied by "water which was ... brackish and of a very offensive smell."[947]

In the latter case, the master of the *Industry*, Thomas Lodge, is accused of having taken in water in Limerick, Ireland, not as was usually done, when the tide in the River Shannon was out, but when it was high, mixed with seawater, and of sending the crew on shore to find their breakfast and then accusing them of desertion. Justice Kerr granted the claimant mariners their discharge due to the pitiful state of the provisions.

It is unclear to what extent complaints were exaggerated, being designed to convince the court to discharge a mariner, but it is noteworthy that the most common defence of the master and shipowner when discharge was sought for unwholesome victuals, is that the men had deserted

944 *The Sir George Prevost*, QVA186-17 (1817 QVA).
945 *The Caster*, QVA 306-23 (1823 QCVA). The accepted daily ration of meat per mariner was two pounds. A lack of variety and of quality in food led to stomach illness and scurvy among the crew. See *The William Pitt*, QVA 821-33 (1833 QCVA).
946 *The Letitia*, QVA 381-25 (1825 QCVA).
947 *The Industry*, QVA 727-31 (1831 QCVA).

the vessel and forfeited their wages. Masters hardly needed to inform claimants that, if they rejoined the vessel after filing suit, the master would "work them up and punish them when he got them at sea for having complained of the insufficiency of the provisions."[948]

Another motive for discharge was deviation from the intended voyage. Voyages were described in the articles signed by the mariners and where the voyage went to another geographical area or set off on a repeat voyage when only one was intended, the mariner could seek his discharge. The vast majority of articles found in the records of the Quebec Vice-Admiralty Court are for a voyage commencing at a named port in the United Kingdom, to Quebec and then back to any place in the United Kingdom, but there are examples of articles where Quebec was not contemplated until the voyage plan changed.[949]

Deviation could even be argued where the additional voyage did not add a great distance, such as continuing to Montreal after Quebec City,[950] or where the length of the voyage would be virtually the same, such as from Liverpool to Quebec City and back, instead of to New York City and back.[951] Many voyages involving an intended voyage from the United Kingdom to the Caribbean and back, were changed to add Quebec to the return voyage between the Caribbean and the United Kingdom.[952] Or Quebec was substituted for a South American port.[953]

But the vice-admiralty courts were not always receptive to deviation, and even disability arguments. In *The Hope of Dartmouth*,[954] the voyage was to be from the United Kingdom to Portugal, and then "on a trading voyage until her return" to the United Kingdom. The ship sailed

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948 *The William Pitt*, *supra*, note 945, deposition of James Wright, seaman.

949 In *The Unanimity*, QVA 26-09 (1809 QCVA), the voyage was to be from Madeira to Cadiz but, en route, the master, Samuel Kent, decided to come to Quebec and then back to the United Kingdom. The claimant, Joseph Amar, protested and took suit upon arrival in Quebec. He was awarded £9 by Jenkin Williams, one of the local advocates, sitting as deputy surrogate vice-admiralty judge in Justice Kerr's absence.

950 *The Bountiful*, QVA DD-09 (1809 QCVA). In *The Cambria*, QVA 619-30 (1830 QCVA), a deviation to Quebec City on a voyage from London to Métis Quebec was sufficient to obtain a discharge, but a deviation from St. John's to Quebec City was not sufficient in *The Dart*, QVA 693-31 (1831 QCVA). The voyage plan was more complex in *The Dart* and might explain the difference.

951 *The Samuel Braddick*, QVA 90-12 (1812 QCVA).

952 See *The Resolution*, QVA 236-20 (1820 QCVA) where a discharge was granted. See also *The Sceptre*, QVA 238-20 (1820 QCVA), *The Swan*, QVA 243-20 (1820 QCVA) and *The Tyne*, QVA 470-27 (1827 QCVA). The latter three claims for discharge appear to have failed, but in *The Friendship*, QVA 612-30 (1830 QCVA) a deviation from Trinidad to Quebec was sufficient to obtain a discharge from Justice Kerr.

953 *The Lord Cathcart*, QVA 237-20 (1820 QCVA).

954 *The Hope of Dartmouth*, QVA 405-26, reasons for judgment reported in the *Quebec Gazette*, September 24, 1826.

to Oporto, then to Newfoundland, and then to Quebec. The chief mate, John Evans, obtained the arrest of the vessel, seeking his discharge for deviation, and arguing in the alternative that he was too ill to carry out his duties. He produced a Quebec medical doctor who testified to that effect. Justice Kerr considered that a "trading voyage" included a voyage to Newfoundland and Quebec City, and dismissed the deviation argument. He noted the chief mate was unable to do his duties, but thought he could do other duties on board and ordered him to sail with the vessel. His view was that the mate would be paid, even if it turned out that he could not work at all, and refused the discharge.

In some cases the deviation was major. In *The William and James*,[955] the intended voyage was from Bay Vert in Nova Scotia to Halifax and back. The claimant mariner, John McKay, boarded in May 1828. But instead of Halifax, the master, Captain Collins, sailed to St. John's Newfoundland, and then to Sligo in Ireland, from where the vessel carried on the coasting trade in Ireland, until May 1829, before returning to Nova Scotia. Having returned to the home port, McKay's *in rem* claim was not for discharge, but for a year's wages. The claim was settled prior to trial.

In many instances of suits alleging deviation, the claimant mariner is no longer on board, and needs his discharge to be able to obtain his wages and recoup his possessions on board. This was the result of a series of Acts of Parliament, and in 1835 those Acts were repealed and replaced with a consolidated *Merchant Seamen Act*.[956] The new Act set a new form for the articles of all British ships. Mariners were to be informed to where the ship was intending to sail, and they were to consent thereto. Thus, the remedy of discharge in case of deviation was still available.

The new Act also prohibited leaving the ship without permission. To leave temporarily led to the forfeiture of a portion of one's wages. To leave with the intent of not returning was to desert. To desert was to forfeit one's wages for the voyage, as well as any belongings remaining on board.[957]

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955 *The William and James*, QVA 575-29 (1829 QCVA).
956 *Merchant Seamen Act*, 1835 (U.K.), 5 & 6 Will. IV, c. 19.
957 *Ibid*., s. 9.

Any mariner absenting himself from his vessel without permission could also be made subject to 30 days of imprisonment before any justice of the peace.[958] This option was very popular in Quebec, and had existed under previous Imperial and provincial legislation.[959] It may have been used as it was intended, but in the records of the Quebec Vice-Admiralty Court, references to the provincial and, after 1835, Imperial *Merchant Seamen Act*, revealed how the legislation was used to prevent mariners from taking action for their wages. Often, claimants were in prison when their action for discharge was filed, and masters could allege desertion as soon as a mariner left the vessel, or exceeded the allowed delay of absence, even if, in reality, the master knew the mariner intended to see a proctor or a doctor.[960]

But to make matters worse, a mariner could furthermore face the possibility of being imprisoned for desertion before judgment at the behest of the master, simply by attending the offices of a Quebec proctor, or even attending in the vice-admiralty court. However, having a constable arrest a claimant for desertion in the courthouse could be a risky venture. In *The William & Mary*,[961] the wage claimant mariner, Daniel McFarlane, was sitting in the vice-admiralty court awaiting the hearing of his suit *in rem* for wages and discharge due to ill-treatment at the hands of the master, Benjamin Robinson, when he was forcibly removed to another room and brought before Ross Cuthbert, a local magistrate, who committed the claimant to a holding cell for 24 hours on charges of desertion filed by the master.

McFarlane's proctor, Robert Christie, was not amused, and moved to have the master arrested on charges of contempt of court. The master being present, allegedly to defend the wage claim, the vice-admiralty judge James Kerr issued a warrant from the bench for his arrest. Following interrogatories put to the master by the Advocate-General, a Crown attorney, the claimant's

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958 *Ibid*., s. 6. See *supra*, note 904.

959 *Merchant Seamen Act*, 1807 (U.K.), 47 Geo. III, c. 9, s. 4. This enactment was the reflection of various earlier Imperial statutes, including the *Merchant Seamen Act,* 1728 (U.K.), 2 Geo. II, c. 36, which were consolidated in the *Merchant Seamen Act,* 1835 (U.K.), 5 & 6 Will. IV, c. 19. Under provincial legislation, imprisonment of deserting mariners was for 20 days. Where the ship was to sail before his release, the master was required to apply to have the man released from prison and brought to the vessel. In fact, from the vice-admiralty records, it appears that mariners were often simply left behind in Quebec.

960 See *The Hannah*, QVA 411A-26 (1826 QCVA), where the claimant carpenter, Henry Kidd, was arrested for desertion even though his ill condition was known to the master, Samuel Webber, who had allowed Kidd to leave the ship to seek medical treatment.

961 *The William & Mary*, QVA 86-11 (1811 QCVA). A master could also have the claimant mariner obducted and returned on board by force. See *The William Money*, QVA 938-34 (1834 QCVA), *supra*, note 881.

proctor also sought the arrest for contempt of John Johnston, the constable who had removed the claimant from the vice-admiralty courtroom to the magistrate's courtroom. In the event, the master was fined 20 pounds for contempt and ordered to be held in custody until it was paid. John Johnston, the constable was later brought before the court and "severely reprimanded" by Kerr, who ordered that Johnston pay all costs wasted due to his participation in the claimant's arrest.[962]

But wage claims could also arise from the dismissal of a mariner or from the refusal of the master or mate to allow a mariner to return from shore and rejoin the vessel. In *The Farmer*,[963] the claimant ship's carpenter, John Reay, sailed from Britain to Quebec where he alleged that he was dismissed by the master, Thomas Darley, and ordered to go on shore. He filed suit *in rem*. The master replied that the claimant went on shore without permission and failed to return, thus becoming a deserter and forfeiting wages and possessions. The vice-admiralty judge accepted the master's arguments and the claimant's suit was dismissed, thereby forfeiting his wages, belongings and tools remaining on board.[964]

In relation to the armed services, during the American Revolution, the Napoleonic wars and the War of 1812, mariners could easily find employment in the navy. The rule of law, retained in the 1835 enactment[965] was that to join the navy was not considered to be deserting one's merchant vessel. To avoid forfeiture of wages and belongings, mariners sometimes enrolled in the navy, thus being able to obtain wages earned and the return of their belongings. But in times of conflict, a navy in need of mariners often resorted to press gangs, and where a master had an undesirable mariner jailed for desertion, thus losing his wages, the master could avoid the obligation to retrieve the man upon sailing, by having him pressed into the navy. No wages or belongings could be retrieved where the mariner had been previously convicted of desertion.

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962 The outcome of the contempt motions appears in the vice-admiralty court registry for August 27 and September 2, 1811. For a similar case see *The Sir George Prevost*, QVA 186-17 (1817 QCVA), where the master, Daniel Morrison, was arrested for contempt after laying desertion charges against the six wage claimants and faced having to pay their costs. In that case, the contempt charge was dismissed, but costs would include not only proctor fees but sustenance for any claimant while in jail. Arresting a mariner for desertion would oblige the master to pay sustenance for the period of incarceration. See *The John & Robert*, QVA 102-12 (1812 QCVA), where the three wage claimant mariners were arrested for desertion at the behest of the master, but later released when no sustenance payment was made.

963 *The Farmer*, QVA 15-08 (1808 QCVA).

964 *Ibid*. The decision appears in the register for September 27, 1809.

965 *Merchant Seamen Act*, *supra*, note 956, at section 46.

A mariner might thus face the possibility in wartime, of being pressed into military service prior to or upon completion of his sentence for desertion. If he was found to have deserted, he would forfeit his wages. That is what happened to Peter Jennings, a mariner on board the *Fox*, who had joined the vessel in Jamaica for a voyage to Quebec and back to Jamaica.[966] He took suit *in rem*, seeking dismissal and wages, also alleging in his libel that, during the voyage to Quebec, the master, Franklin Gardner, beat him with rope ends, and other instruments. The master denied the allegations in his answer. The master then attended at the Quebec City courthouse and accused the claimant of desertion. The claimant was arrested, but the master said he would agree to take the claimant back on board. The claimant refused, but was led out of prison under guard to be returned on board.

However, it so happened that a press gang was at the prison gate and took Jennings into His Majesty's service. The master signed an affidavit denying any role in summoning the press gang, although the coincidence seems doubtful. The claimant not being available for further proceedings, the court accepted the desertion allegations of the master and the suit was dismissed.[967] The claimant's proctor, Pierre Martin Dufau, having agreed to act *in forma pauperis*, was also out of luck because the master's proctor moved to have the claimant dispaupered. The claimant not being available to prove his economic situation, the motion was successful, and an order made for the claimant's proctor to pay the bill of costs of the master. A similar fate could await a claimant seeking discharge for reasons of illness or injury.[968]

Where a mariner voluntarily left a vessel to join the armed forces, he was supposed to have a right to his wages and possessions. Mariners nevertheless often faced resistance in claiming their wages and belongings. In *The Countess of Leven and Melville*,[969] the wage claimant mariner, Thomas Anderson, left the vessel to join the provincial marine. He filed suit *in rem* against the

966 *The Fox*, QVA 09-05 (1805 QCVA).

967 Jenning's petition for the arrest of the *Fox* was filed on October 22, 1805. The dismissal order appears in the court's register for November 13, 1805. Dismissal meant that Jennings lost his wages and belongings.

968 See, for example, *The City of Edinburgh*, QVA 10-04 (1804 QCVA), where the master, George Posgate, alleged desertion and that the wage claimant, Manuel Ignatio, was given to debauch, whereas Ignatio alleged he was unable to return to his duties as second mate. The court agreed with the master's allegation of desertion and dismissed the claim. The claimant moved for appeal but, being dispaupered and unable to provide security for the prosecution of the appeal, the appeal was vacated, and the shipowner avoided paying wages or medical expenses.

969 *The Countess of Leven and Melville*, QVA 21-10 (1810 QCVA).

vessel. The master, David Seutter, alleged desertion but later settled the claim.[970] Many similar claims appear in the records of the Quebec Vice-Admiralty Court during the wars with France and the period leading up to the War of 1812.[971]

The jurisdiction of the Quebec Vice-Admiralty Court could be exercised *in rem* and *in personam*. But only the court's records can help distinguish between the two remedies, and provide a glimpse as to how *in rem* jurisdiction developed in Quebec.

The Development of *in rem* Procedure in Quebec

As has been seen, the admiralty courts in New France were familiar with seizures before judgment, but it took the arrival of the British and the creation of the Quebec Vice-Admiralty Court in 1764, to introduce *in rem* process to Quebec. In the civilian admiralty court in England, admiralty process had always been commenced with an arrest. This had, according to Marsden, been the case at least since the establishment of the High Court of Admiralty in the 1500s. As noted above,[972] Marsden determined that, from the beginning of the High Court of Admiralty records until 1602, there was no trace of the concept of a maritime lien, and the arrest of any assets of the defendant was the rule, leading Marsden to conclude that arrest must have simply been a means to compel the defendant's personal appearance.

Had the situation changed by the commencement of the period under review in this enquiry? To determine whether and to what extent the concept of arresting the "wrongdoing" ship had already been accepted by the beginning of the eighteenth century, or with the commencement of the Quebec Vice-Admiralty Court, requires the review, not only of the records of the Quebec court, but also those of the High Court of Admiralty.

It has been determined that the modern vocabulary of *in rem* and *in personam* admiralty actions would only crystallize during the nineteenth century and emerge in the English literature when

970 The settlement appears in the register for April 13, 1810.

971 See for example *The Lady Borington*, QVA 24-08 (1808 QCVA), *The Diana*, QVA 46-10 (1810 QCVA), *The Princess Amelia*, QVA 54-10 (1810 QCVA), *The Pitt*, QVA 74-11 (1811 QCVA), *The Emanuel*, QVA 79-11 (1811 QCVA), *The Heart of Oak*, QVA 82-11 (1811 QCVA), *The Brother*, QVA 94-12 (1812 QCVA) and *The Ocean*, QVA 125-14 (1814 QCVA), where similar pleas of desertion were withdrawn in settlement or dismissed in wage claims by mariners joining the armed forces. However, the plea was sometimes successful. See *The Maria*, QVA 55-10 (1810 QCVA).

972 See the text accompanying note 324 above.

Browne was producing his "compendious view" and the reporting of admiralty cases was in its infancy.

Prichard and Yale suggest that the terms *in rem* and *in personam* may have "intruded" into the discussion of any link that a claimant might have been required to demonstrate between the arrested property and the claim of the plaintiff,[973] but that the absence of the recording or reporting of reasons until the end of the eighteenth century reduces this idea to mere conjecture. They note that, in the common law courts, the concept that the admiralty courts could be allowed to consider the liability of the arrested property, left one particular form of process, *in rem*, free from prohibitions.

But interpreting civilian process through the arguments of common lawyers can only take one so far. In 1613, Serjeant Nichols, a leading common lawyer, argued that an action in admiralty was to be taken solely against the ship and goods and not against a party.[974] In 1633, the Privy Council settlement included, as its third point, the statement that a suit in admiralty for the building, repairing or supplying of necessaries to a ship, "when against the ship itself, and not against any party by name", would not allow a defendant to voluntarily appear in admiralty and thereafter obtain a prohibition in Westminster.

There is no doubt that the thrust of this measure was to avoid prohibitions where a defendant appeared in admiralty voluntarily. But the fact that the settlement referred to suits against a ship that had been built, repaired or supplied, was a large step to have been taken in only three decades since Marsden's conclusion that arrest was of any asset whatsoever, whether related to the cause of action or not.

In 1663, the Attorney-General would refer to the term *agere in rem* as the civilians were trying to get Parliament to reconfirm the earlier conciliar settlements and Interregnum legislation. The efforts were fruitless, but process *in rem* had progressed to the point that the last bill proposed, in 1685, included not only a reference to suits taken against the ship for building, repairing and

973 *Hale and Fleetwood*, *supra*, note 41, at page xlvi.

974 *Greenway v. Barker* (1613), Godbolt 260, 78 E.R. 151 (K.B.). The case concerned the effect of stipulations in admiralty. The report of the case is however unclear. See the text accompanying note 295 above.

supplying, but also to suits taken against the ship for the wages of mariners having worked thereon.

Prichard and Yale interpret this evolution as the result of a subtle change in the way common law courts formulated their limitations on admiralty jurisdiction. During the first half of the seventeenth century, they concentrated on territoriality, i.e. did the dispute arise on land or at sea? Following the Interregnum, the common lawyers were increasingly formulating their arguments in terms of liability, i.e. did the dispute arise due to the liability of the ship and not the defendant personally? Prichard and Yale remain intrigued by the absence of the terms *in rem* and *in personam* prior to the publication of Browne's treatise, although it is clear that Browne did not coin either phrase, and the idea of property having liability in admiralty had become dominant during the eighteenth century.[975]

But Prichard and Yale are obliged to draw these conclusions on the slightest of evidence, found principally in two or three poorly reported common law cases. Common law prohibitions, argued by serjeants-at-law jealous of admiralty business, were not the best source of intelligence for civilian practice. For example, in 1703, the King's Bench noted that, in hypothecation cases, where the action in admiralty had been taken against the subject ship and its owners, a prohibition would issue to prevent the suit against the owners, but the action against the ship would be allowed to continue, because the King's Bench had no jurisdiction to act against the vessel.[976]

Once again, the "inscrutable character"[977] of civilian process, the absence of reported decisions before the end of the eighteenth century, and confusing arguments in the common law reports concerning prohibitions, contributed to the intrigue of the true nature of admiralty suits. A review of the records for the period under review will hopefully be a better guide than the common law reports.

Process in the Quebec Vice-Admiralty Court, like that in the High Court of Admiralty, began with the issuance of a warrant of arrest, usually of a ship, cargo or freight. In England, the

975 *Hale and Fleetwood*, *supra*, note 41, at page xlvii.
976 *Johnson v. Shippen*, (1703), 2 Ld. Raym. 982, 91 E.R. 154 (K.B.).
977 *Hale and Fleetwood*, *supra*, note 41, at page xlvi.

proctor wishing to obtain the arrest would make an entry in the proper court record, somewhat like a præcipe, requesting the warrant to be directed against the designated defendant. In the High Court of Admiralty, this record was the Warrant Book, a bound record consisting of chronological entries of requests for arrest. A typical entry would read "Arrest the ship called the *Argyle*, whereof James Nicholson now is or late was master, and her tackle, apparel and furniture, wherever the same are, and cite all persons in general to appear the third day after the arrest, to answer unto James Karridge and company, late mariners of the said ship in a cause of substration of wages, civil and maritime."[978]

Prior to 1832

In Quebec, there do not appear to have been Warrant Books kept prior to the 1832 Rules. An arrest was however required for the commencement of each action. The vocabulary is not always consistent. In the first extant case file from 1780,[979] the court issues a citation to the master, ordering the marshal to take the ship into custody in a claim for pilotage services. In a case from 1799, a warrant of "attachment" is issued to arrest the defendant ship in a claim for necessaries.[980] The wording of the attachment is in every respect that of a warrant of arrest. That case contains an early affidavit in French to obtain or "lead" the warrant, even though such affidavits were only required in England from 1801.[981]

The usual method of commencing an action in the Quebec Vice-Admiralty Court prior to the 1832 Rules was by petition, from about 1810 sometimes called summary petition in wage claims, and by the time the 1832 Rules were adopted, that term had become common in most cases. The defendant could move to have the claimant file a more formal libel, notwithstanding the filing of the petition or summary petition, a practice that would terminate with the 1832 Rules. Petitions

978 So reads the entry of July 30, 1737, made by the proctor for the crew, Mr. Lee. Given names for proctors were not indicated and, although this is likely the entry of John Lee, admitted as a proctor in 1734, a certain Godfrey Lee had been adimitted as a proctor in 1673, and was still practising in 1707, although probably not in 1734. See E.H.W. Dunkin, Claude Jenkins and E.A. Fry, *Index to the Act Books of the Archbishops of Canterbury, 1663-1859* (London: Publications of the British Record Society, The Index Library, vols. 55 and 63, 1929 and 1938), vol. 63, at page 16. The form of action to precede a warrant was set out in similar language in an appendix to the 1832 Rules.

979 *The Archer*, QVA 01-80 (1780 QCVA).

980 *The Bittern*, QVA 06-99 (1799 QCVA).

981 See the text accompanying note 355 above.

and summary petitions were accompanied by an affidavit to lead the monition or attachment of the ship or other property that was the subject of the action.[982]

The introductory paragraphs of the petition set out briefly the nature of the claim, in a wage claim for example, stating that the petitioner had been hired, had served the master, but had been ill-treated or fallen ill and would be unable to continue the voyage, therefore claiming his discharge and wages to date.

The prayer clause would invariably allege that the subject matter of the suit was of a civil and maritime nature, and thus properly cognizable by an admiralty court, and therefore the petitioner prayed for a "writ of monition and attachment", such that property, usually the ship, her tackle, apparel and furniture, might be taken into the custody of the marshal, to respond to the demand of the petitioner. The petition usually further requested that the master be cited to appear and answer the libel to be filed by the petitioner.

The proctor then filled in a draft order for the vice-admiralty judge to sign, commanding that a warrant and monition issue to attach the subject ship, freight or cargo, and, if applicable, that the petitioner be admitted to sue *in forma pauperis*.[983] Once the petition signed, the registrar would

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[982] For an early example, see *The George*, QVA 12-06 (1806 QCVA), a wage claim. The term summary petition was used from time to time in answers filed by defendants to describe petitions, but the first proceeding entitled summary petition was in *The Lydia*, QVA 47-10 (1810 QCVA). Summary petition was made a term of art in the 1832 Rules, where the term was designated as the introductory proceeding for wage claims by mariners and pilots. See the text accompanying note 525 above.

[983] In the Quebec Vice-Admiralty Court records there are 370 instances of claimants seeking *in forma pauperis* status between *The Fox*, QVA 09-05 (1805 QCVA), a wage claim mentioned *supra*, in notes 966 and 967, and *The Harvey*, QVA 776-33 (1833 QCVA), a passenger claim for assault. Certain claims prior to 1805 undoubtedly invoked the remedy, but the first court register makes no mention of the status. Where damages were claimed independently of a wage claim, such as for assault, the remedy could be contested if there was a potential gain substantial enough to support paying fees, much as in many modern legal aid schemes where assistance is denied if a gain is to be expected. In *The Prince George*, QVA 83-11 (1811 QCVA), the claimant mariner, William Wood, consents to being dispaupered, presumably due to the potentially lucrative combination of his claim for wages and in damages for assault by the master, John Fotheringham. In *The Saguenay*, QVA VV-22 (1822 QCVA), the claimant mariner, Richard Bowen, seeks five pounds in wages and ten pounds in damages for ill-treatment at the hands of the master. Justice Kerr allows him *in forma pauperis* status for the wage claim only. In *The Cheviot*, QVA 554-29 (1829 QCVA), the claimant boy, Lawrence Fitzgerald, first files a summary petition claiming wages and damages for having been beaten and discharged in Quebec by the master, John Henney, and then, having been paid his wages, files a second summary petition for damages only. Justice Kerr grants *in forma pauperis* status for the first claim, but it is not even requested for the second, the claimant having his wages to pay a proctor. However, the monition issued on the second summary petition is endorsed by the marshal, indicating that it was never served, the claimant still not having sufficient funds to advance the marshal's disbursements for an arrest. In a provincial enactment concerning the administration of justice, (1801), 41 Geo. III, c. 7, s. 2, it was enacted that any resident of Lower Canada, sued by a non-resident

issue the warrant or monition on behalf of the court. These were variably referred to as warrants of monition or of attachment, but were in fact warrants of arrest. They were endorsed by the marshal, confirming service of the warrant, and thus arrest, or that arrest was impossible, due to the ship having sailed, or for any other reason.

Vessels and cargoes in Crown matters, including Navigation Act litigation, claims for droits of admiralty, and claims for overloading passenger vessels, were often immediately seized by Customs officials, and thereafter proceedings commenced in the vice-admiralty. The petition would be called a summary petition, or an information or summary information, and would not contain a request for arrest, but rather a request for a monition to be published, calling for anyone interested in the previously seized property to come forward and state their interest therein, and to explain why the property, or the proceeds of its sale, or for passenger vessel fines, the amount of the fine, should not be entirely forfeited and paid to the Crown or distributed.

Similarly, in salvage claims, where the possession of the salved property was already in the hands of the claimant salvor, a summary petition would call for the publication of a monition citing all those having an interest in the salved property. However, in salvage claims, as in Crown claims, where the goods were not already seized, such as where they were inaccessible, a monition for their arrest would be issued in the usual manner.

It is of importance to recall that, prior to the 1832 Rules, the initiation of process in the Quebec Vice-Admiralty Court required a petition, either sworn as, or accompanied by an affidavit, on the part of the claimant, the signature of his proctor where, as in so many wage claims, he was seeking to avoid costs by suing as a pauper, and the endorsement of the vice-admiralty judge, before the arrest could issue. And an arrest was required to commence a suit. Thus, it can be seen that the judge had to personally allow each claim to proceed. The signature on petitions filed prior to the 1832 Rules is that of Justice James Kerr himself, vice-admiralty judge during most of the period under review. It is not the signature of the registrar.

claimant, could obtain security for costs. In a wage claim, *The John Porter*, QVA 545-29 (1829 QCVA), the vessel's owner, James Hamilton, a Quebec resident, relied on this provision to try to have the claimant mariners, Nils Christian and Henry Cold, dispaupered. The point does not appear to have been pressed and the motion was dismissed by Justice Kerr. The provincial statute would not likely be applicable before the Quebec Vice-Admiralty Court. There are only a handful of vice-admiralty *in forma pauperis* claims following the adoption of the 1832 Act, possibly because of the introduction of proceedings by summary petition for claims for wages by mariners and pilots.

Thereafter, the warrant or monition of arrest would be sealed by the court and issued by the registrar in the name of the king, and the judge would not need to be involved in its preparation or issuance. However, in practice, almost all of the monitions or warrants issued by the court prior to 1832 also bore the signature of Justice Kerr or a deputy judge, immediately below the seal of the court. These signatures appear to have been apposed in blank prior to the issuance of the warrants. The practice was discontinued shortly after the adoption of the 1832 Rules, following which the nomenclature was standardized to the term warrant.

Thus, in 1829, in the wage claim *The John Porter*,[984] Francis Ward Primrose, this time sitting as a deputy judge in Kerr's absence, authorized the issuing of a monition to arrest a ship in a claim *in rem* for wages, even though the petition was addressed to Justice Kerr. The monition, a printed form commonly used in the court in the 1820s, bore the signature of Justice Kerr, and was tested by him, in the sense that the document included a paragraph at the end, stating "witness the Honourable James Kerr, Esquire, Judge Surrogate and Commissary" followed by the signature of the registrar, whereas Kerr had clearly not signed or even seen the document, except perhaps as a blank form of monition.

The monition was contested before Primrose. The claimants' advocate reminded the court that in provincial court practice, writs of attachment or of *capias* were issued by prothonotaries, and tested by the senior judge, even though he would not yet have been made aware of the action. Primrose stated that it was doubtful whether, with the seal of the court and the registrar's signature, a judge need sign as well. He decided however, that if a judge were to sign, it would have to be the judge ordering the issuance. Primrose noted that Clerke, in title 2 of *Praxis Admiralitatis*, states that the warrant is to be issued in the name of the Lord High Admiral,[985] directed to all bailiffs and to the marshal of the court, and does not require a judicial decree. Nevertheless, Primrose dismissed the suit due to the irregularity of the monition. Warrants issued following the coming into force of the 1832 Rules were in the name of the king, but no longer bore the paragraph whereby the admiralty judge tested the instrument.

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984 *The John Porter*, QVA 545-29 (1829 QCVA). See *supra*, note 532.

985 *Supra*, note 305. Primrose does not specify which edition of Clerke he refers to, but it was not likely the 1809 American version, as that version notes that warrants were, long after Clerke's time, issued in the name of the king. Primrose did not consider what would be the effect of a monition signed by the issuing deputy judge, but stating on the printed form to have been tested by Justice Kerr. That was the situation in *The Thomas*, QVA 415-26 (1826 QCVA), another wage claim, but the monition in that suit was not contested.

It is not possible to determine whether and how often the court refused to issue process prior to the coming into force of the 1832 Rules, due to the fact that the refusal would mean that no proceedings would be commenced and thus no record would exist. There were cases where the suit was allowed to proceed, but where the judge refused to allow the claimant to proceed *in forma pauperis*, often resulting in the abandonment of the suit.[986] And there were numerous motions on behalf of defendants to have the claimant dispaupered due to his claim for damages being combined with a claim for wages. If successful, such a motion could in effect put an end to the proceedings, as the claimant's proctor would likely refuse to continue without some prospect of being paid.[987]

Nor is it possible to know what interaction there was between the proctor presenting a petition and the vice-admiralty judge. Was counsel obliged to appear in open court and justify the demand? It is certain that this was the early practice in Quebec, as the first entry for each new suit in the new court's first register, which contains the day-by-day description of proceedings, involves counsel for the claimant moving the court to issue a monition against the defendant vessel.[988] However, that the practice continued for a long time is doubtful, as the first entry for each new case in all other extant Quebec registers, involves a prayer, on behalf of the claimant, that the marshal return the warrant or monition and certify the due execution thereof.[989]

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986 In *The Countess of Harcourt*, QVA 556-29 (1829 QCVA), the summary petition of the wage claimant mariner, John Duckham, bears the notation by his proctor, Charles Drolet, "I declare that I withdraw from this cause, it not having been granted *in forma pauperis*." The notation was made on the day of issue of the summary petition. Nonetheless, the monition was issued and depositions taken by the registrar. However, ten days following the summary petition, with no new proctor on the file, the suit was dismissed for want of prosecution. In *The Hope*, QVA 558-29 (1829 QCVA), the claimant carpenter, Wiliam Hamilton, was denied permission to proceed in his wage claim *in forma pauperis* and the suit appears to have gone no further. A similar situation appears in *The Vista*, QVA 593-29 (1829 QCVA), yet another pre-1832 Rules wage claim.

987 See *The Peggy*, QVA 308-23 (1823 QCVA), for an example of a successful petition to have both wage claimant mariners dispaupered, and a final decree dismissing the claim upon the claimants' proctor, Hilaire Girard, advising the court that he would not continue to act for the claimants. See also the text accompanying note 532 above.

988 The very first case, *The Phoenix*, QVA A-64 (1764 QCVA), being a Navigation Act claim, probably involved a customs seizure of ship and illicit cargo, and not an arrest by the new vice-admiralty court, but in the second case, a wage claim in *The Swallow*, QVA B-64 (1764 QCVA), John Morrison, counsel for the claimant Robert Slowley, moves the court that a monition might issue against the defendant vessel. This procedure in open court continues throughout the first register, which ends in 1775.

989 See as an example, the first entry for *The Fox*, *supra*, notes 966 and 967, on October 29, 1805, where Pierre Martin Dufau, counsel for the wage claimant mariner, Peter Jennings, prays the return of the "writ of attachment". By 1808, the vocabulary was stabilized to refer to the monition, and sometimes to the attachment. The extant registers do not extend to 1832 but, presumably, the term warrant was used as from the 1832 Rules, which formalized the use of the term warrant of arrest.

If not in open court, would counsel have to attend in chambers to obtain the admiralty judge's consent to issue a monition? It is not possible to know for certain whether such a practice ever existed in Quebec, as the process is not explained in any rule, and there was no reporting of admiralty decisions in Quebec until 1836. However, considering that no serious argument was required, the petitions, especially in wage suits, being virtually all identical, it is more likely that, from the beginning of the nineteenth century, the draft petition would simply be left with the registrar for the judge's signature. But it is clear that the registrar could not issue the warrant without the judge's express permission before 1832. And considering the endorsement of the judge on certain wage suit petitions, confirming his refusal of the request to allow the claim to proceed *in forma pauperis*, the least that can be said is that authorization was not automatic.

The 1832 Rules

The 1832 Rules changed the vocabulary, if not the essence of an admiralty suit. The petition, or, for mariner and pilot wage claims, summary petition, was preceded by an affidavit to lead warrant, following which a warrant was issued. As noted above, affidavits had existed before 1832. In certain earlier files, the affidavit appears in lieu of, or as part of the petition, but in many cases prior to 1832, a separate affidavit was prepared. However, in wage claims, it became common, in the years leading up to the adoption of the 1832 Rules, to combine the affidavit of the claimant into the petition or summary petition, often as a simple endorsement testing that the facts as stated in the petition were true and, where *in forma pauperis* status was sought, that the claimant was not worth five pounds, "his wearing apparel and the subject matter of the suit excepted."[990] When a separate document, the affidavit could either be very short, simply referring

[990] See *The Prince George*, QVA 83-11 (1811 QCVA), *supra*, note 983, for an example of an affidavit being used as a wage claim petition, endorsed by the claimant's proctor, John Fletcher, agreeing to act *in forma pauperis* and by the admiralty judge. Another example is in *The Unity*, QVA 143-15 (1815 QCVA), where the wage claimant mariner, Peter Mitchell, was sent by the master, Thomas McAlpine, on board a navy vessel in Quebec, but was not retained by the commander, and thus returned on board the *Unity*. McAlpine, apparently no more enamoured by Mitchell than on the voyage out, then had him arrested on charges of desertion. The affidavit of McAlpine serves as a petition. On the other hand, in *The Kennesley Castle*, QVA 126-14 (181 QCVA), the petition is endorsed with the affidavit of Frederic Schneider, the wage claimant mariner, attesting to the truth of the contents of the petition. As a further simplification, in *The Swift*, QVA 139-16 (1816 QCVA), the summary petition is sworn by William Fleming, the ship's carpenter, as to its truth and as to the claimant's poverty. The summary petition is then attested by John Gawler Thompson, the claimant's proctor, who agrees to act *in forma pauperis*, and by Justice Kerr, allowing a monition to issue for Fleming's wages as prayed. Where several mariners joined in one suit for wages, they would all sign the affidavit endorsement. See *The Highland Lad*, QVA 178-17 (1817 QCVA), where five affiants sign together. See *The Dædalus*, QVA 182-17 (1817 QCVA),

to the petition, or it could repeat the essential paragraphs of the petition, repeating in a wage or assault claim that the claimant had been hired, had signed the ship's articles, had served, had earned his wages and had been ill-treated, but without repeating the prayer of *in forma pauperis* or the relief sought.[991]

All proceedings were written on paper, usually in English, but sometimes in French. In England, the warrant would be on parchment, a very expensive material in the colonies. Further, from the beginning of the 1800s, printing presses were becoming common in Quebec and certain pleadings, starting with witness subpoenas and surety stipulations or bailbonds, were often written on pre-printed forms. The first printed warrant or monition forms appear in 1815, and the first printed petitions in 1824.[992] But from 1832, proceedings were either on plea and proof, as before, or on act on petition, a more informal method, especially useful in suits involving competing claims to arrested property, and manuscript proceedings remained in use throughout the period under review.[993]

Rule 7 of the 1832 Rules stated that the vice-admiralty registry was to keep Action Books for the purpose of the commencement of each action in the form of a request for a warrant of arrest.

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where seven claimant mariners sign two separate summary petitions. Rule 15 of the 1832 Rules would later limit multiple wage claimants to a maximum of six.

991 An example of a long form affidavit in a wage claim is in *The Maria*, QVA 175-17 (1817 QCVA), where John Gibson, one of three wage claimant mariners, signs. Usually only one affidavit appears for each claimant. However, in at least one case, a short form and long form affidavit appear together. See *The Rose*, QVA 62-11 (1811 QCVA), where wage claimant mariner Cornelius Grace signs both forms on the same day.

992 The use of printed forms was not exclusive to vice-admiralty proceedings, and the first printed warrant in the vice-admiralty records is actually a form used by Justices of the Peace for the arrest for desertion of Peter Mitchell, a vice-admiralty court wage claimant. See *The Unity*, QVA 143-15 (1815 QCVA) where, from the record of September 21, 1815, it appears that Mitchell was ultimately successful in his claim. However, the same year the vice-admiralty was issuing monitions on printed forms. See *The William*, QVA 155-15 (1815 QCVA), a Navigation Act case where cargo was seized by Customs agents, but then arrested in vice-admiralty for good measure. The printing of forms may have been initiated by these claims as, from 1815, Navigation Act claims, which already involved more formal pleadings than ordinary wage or other claims, invariably involved monitions being issued on printed forms. Printed monition forms for other civil claims were in use from 1824 and common thereafter. The first appears to be in *The Fairfield*, QVA 264-24 (1824 QCVA), a wage claim. Printed petitions, labelled summary petitions, first appeared in 1831. The first appears to be in the assault damage claim *The Caroline*, QVA 644-31 (1831 QCVA). But following the 1832 Rules, the use of printed summary petition forms was common.

993 See the text accompanying note 524 above. The act on petition does not appear to have given rise to a pre-printed form. Proceeding by act on petition was common in salvage cases where there were claims to property, as set out in rule 19 of the 1832 Rules, but could also be used in bottomry claims, in possession of vessel suits, and in any suit where argument was required to settle an incidental dispute. See rule 34 of the 1832 Rules. The procedure was not designed to replace summary petitions in wage claims, but was occasionally used to introduce wage claims where the ship was to be sold and incidental claims of priority were involved. See, for example, *The Félicité*, QVA 1000-35 (1835 QCVA).

Thereafter, the procedure in all vice-admiralty registries would be aligned with that of the High Court of Admiralty, where Warrant Books had been kept for this purpose since 1540. It would only be in 1854 that the requirement to "sue out a warrant" for the arrest of the defendant ship, cargo or freight would no longer be required in England, and an action which would otherwise be *in rem*, could be commenced by the issuing of a monition to be served *in personam* on the owners of the subject of the action.[994] This new practice was however not made applicable to vice-admiralty proceedings during the period under review.

With the 1832 Rules, proctors in Quebec, like those in London, made their own entries in the Action Books, which constitute a continuous chronological record of suits introduced in the vice-admiralty court. As had always been the practice in London, the consent of the admiralty judge, in open court, in chambers or in the registry, would no longer be required. The request of a proctor, along with the affidavit to lead warrant of the claimant, and the payment of the required issuance fee, enabled the registrar to issue a warrant of arrest for service by the marshal. Much as in the modern practice, the admiralty judge would only become involved if the warrant of arrest were to be later contested by the defendant.

By the time of the creation of the Quebec Vice-Admiralty Court in 1764, the practice of Clerke's time, of being able to arrest any property of the defendant to obtain his appearance, had evolved into the more modern practice of *in rem* process. Thus, throughout the period under review, suits were commenced in the Quebec Vice-Admiralty Court by the obtaining of a warrant enjoining the marshal to arrest the subject of the action. There is no trace in the vice-admiralty records of arresting goods that had nothing to do with the cause of action.

That this practice existed from the creation of the vice-admiralty court in Quebec is evidenced from the review of the first register, commencing in September of 1764. In a series of four wage suits, newly-appointed vice-admiralty judge Potts orders, at the request of the claimants, that monitions issue for the arrest of the ship *Swallow*.[995] As mentioned above, the request for arrest was made in open court at the outset, but regardless of the requirement to obtain the consent of the admiralty judge, the property to be arrested was the property that was the subject of the

994 *Admiralty Court Act, 1854* (U.K.), 17 & 18 Vict., c. 78, s. 13. See the text accompanying note 562 above.
995 *The Swallow*, QVA B-64, C-64, D-64 and E-64 (1764 QCVA).

action. Later entries in the first register confirm that this more modern *in rem* process was already well-known before the new court.

It should be noted that this was only a few years after the admiralty court of the French regime was replaced. Although the former court had not known *in rem* process, and several French practitioners had returned to France, others would remain in Quebec following the arrival of the British and appeared in the Quebec courts. Other French Canadians would be admitted to practice in the vice-admiralty, including members of the Panet family, well-known as practitioners in the French admiralty court in Quebec, where notary Jean-Claude Panet had arguably been the leading practitioner.

However, the early registers confirm that the new vice-admiralty court was mostly manned by English-speaking practitioners and no French-regime admiralty practitioner appears to have been admitted to practice as a proctor by the new court. The records of the new court confirm that both English and French were used in witness statements and even in pleadings. But for all its civilian flavour, the fact that the new vice-admiralty court required familiarity with the English language would have been an obstacle for many practitioners of the former regime.

The earliest entries in the first register of the vice-admiralty court reveal the workload of the new court, and the procedure that would develop throughout the period under review. Whereas the former French court, as has been seen, had extensive jurisdiction over sale of goods claims, fisheries disputes and claims for prize, the workload of the new court included a large number of Navigation Act disputes.[996] However, the sole route to the colony was by sea and private maritime disputes continued to rise. Like the French court before it, the vice-admiralty court in the first decade of its existence heard numerous wage claims, as well as charter-party[997] and bill of lading disputes,[998] collision cases,[999] salvage claims,[1000] claims for necessaries,[1001] claims for

[996] The very first suit heard by the new court was a Navigation Act dispute over imported wine. See *The Phoenix*, QVA A-64 (1764 QCVA).
[997] *The Hazard*, QVA L-65 (1765 QCVA).
[998] *The Expedition*, QVA T-69 (1769 QCVA).
[999] *The Richard & Benjamin*, QVA M-66 (1766 QCVA). See also *The Anthony*, QVA I^2-74 (1774 QCVA).
[1000] *The Matilda*, QVA E^2-73 (1773 QCVA).
[1001] *The Modetti and The Gaspey*, QVA R-68 (1768 QCVA).

pilotage services,[1002] claims in damages for assault and battery on board[1003] and claims on marine insurance policies.[1004]

Many similar disputes had been heard by the French regime court. But what was truly new was the British admiralty procedure. The procedure of the new court was not that of the former French court. Regardless of the practice of obtaining seizures before judgment in New France, the concept of beginning each suit with a warrant of arrest was unknown to the French. But this new procedure developed for each of the main heads of jurisdiction of the Quebec Vice-Admiralty Court.

Any study of admiralty procedure during the period under review must be concerned with wage claims. The French court had heard many wage claims, but the new vice-admiralty court developed in a more international environment. The British colony was now part of a much larger geography, with settlements in eastern Canada, but also in New England, in the plantation colonies along the Atlantic coast and in the Caribbean islands. Trade with France had been important during the former regime and, as has been seen, many admiralty cases involved commercial disputes with merchants from La Rochelle, Paris and Rouen. But trade increased rapidly with the arrival of the British, and the Navigation Acts, which had been in force for more than a century when the new court was established, increased the sea trade with Europe and the docket of the admiralty courts.

Wage claims naturally followed this curve of acceleration. And, for the reasons set out above, claimants had to do more than simply claim wages in Quebec. They had to convince the court that they should not be obliged to continue their contract to destination, and that they deserved a discharge. It is for this reason that so much effort was placed on proving the conditions on board. In England, following a regular discharge, money could be unpaid, but no discharge order was required.

Consequently, wage claims became the most important part of the Quebec court's workload. Seafarers' services were rendered at sea and jurisdiction over wage claims was sheltered from

[1002] *The Little William*, QVA N-67 (1767 QCVA).
[1003] *The Diamond*, QVA S-68 (1768 QCVA).
[1004] See *The Mary*, QVA A^2-71 and *The Rose*, QVA B^2-71 (1771 QCVA). See also *The Athol*, QVA L^2-75 (1775 QCVA).

any discussion of whether the admiralty could hear the complaint. During the period under review, of the 3,064 extant Quebec court files reviewed, 2,272 involved claims for wages. This figure alone illustrates the importance of these claims to the new court. It would be impossible to comment in this enquiry on even a portion of these claims, but some comments on procedure in wage cases are required.

It should first be noted that wage claims and suits in damages for assault often appear together in that, for the reasons set out above, the claim for a discharge would often be based on ill-treatment at the hands of the master or mate of the vessel. The two types of claim also share a level of risk that maritime claims made by other claimants, who need not return on board, would not experience. If the wage or assault claimant's suit for discharge were to be rejected by the court, the claimant would either then have to return to the vessel and set sail, or desert and forfeit his wages and all of his belongings on board. One can only imagine the level of stress an unsuccessful mariner would endure in such a case.

Vice-admiralty procedure allowed several mariners to claim together in one action, a cost-saving exercise not allowed before the courts of common law. In *The Headley Grove*,[1005] nine mariners claimed their wages and obtained a monition for the arrest of the *Headley Grove*. The master, John Cornforth, replied that they had been disobedient and had deserted the vessel. After a summary hearing, the action was dismissed and the men lost their wages and belongings.[1006] Rule 15 of the 1832 Rules would limit multiple wage claimants to a maximum of six.

From a purely procedural point of view, prior to the 1832 Rules, process on all types of claim was similar, although somewhat less formal in wage claims. The main difference was the preparation of more detailed pleadings. Most wage cases proceeded summarily, and did not require a libel to be prepared, although this was not the case where a wage claim was out of the

[1005] *The Headley Grove*, QVA 18A-09 (1809 QCVA).

[1006] *Ibid*. The decision is in the register for December 21, 1809. On the same day, two other claims for wages were dismissed for desertion. See *The Hercules*, QVA 19-09 (1809 QCVA) and *The Newland*, QVA 28-09 (1809 QCVA). In all three cases, the advocate for the claimant was John Ross and for the defendant appeared Andrew Stuart, both lawyers of experience in admiralty matters.

ordinary, such as where a passenger was enrolled to serve as a mariner during the voyage, without having signed onto the ship's articles, and claimed wages upon arrival.[1007]

Where a libel was prepared, the form was usually in consecutively numbered paragraphs, setting out, often repetitiously, the details of the voyage and the breach of contract or fault of the ship, its master or crew, and the redress sought from the court. In Crown matters, proceedings were more formal, and libels even more verbose, and written on larger size paper of better quality than usual. Wherever a libel was filed, an answer was filed by the defendant, often accompanied by a counterclaim, and the pleadings allowed for replication on the part of both parties. In summary proceedings for wages, the defendant could nonetheless file a plea or answer. One difference with wage claims was reflected in the reference to the parties. In early Quebec admiralty cases, the claimant was referred to as the libellant and the defendant as the respondent. But once the more summary procedure had rendered libels unnecessary for wage claims, and thus for the majority of admiralty business, claimants were referred to as promovents, and defendants as impugnants.

The 1832 Rules affected not only wage claims, but all claims before the Quebec Vice-Admiralty Court. Although there were some suits still initiated in the former fashion during the fall of 1832, and the spring and summer of 1833, most new suits were immediately introduced on the new model. Whereas summary petitions were used in various claims before 1832, the normal statement of claim became a libel with the new rules. Thus, the term libel was at first used for virtually all new claims, even where an act on petition could have been used for salvage claims, and a summary petition could have been used for wage claims.[1008] However, the summary

[1007] See, for example, *The Unanimity*, QVA 26-09 (1809 QCVA).

[1008] See, for example, *The Thomas Gelston*, QVA 784-33 (1833 QCVA). This *in rem* wage claim by mariners Samuel Miller and John Thomas raised the question of what provisions were to be provided to mariners on board vessels. It proceeded on libel and plea and proof with the examination of at least 24 witnesses. In *The Marie*, QVA 804-33 (1833 QCVA), the master, Joseph Michaud, arranged for wages to be paid to William Potts, the claimant mariner, by James Baxter, the vessel's charterer. Baxter did not pay, and Potts had the ship arrested and filed a libel. Michaud argued substitution of debtor, but the court held that the wages followed the ship and ordered an appraisement and sale. In *The Margaret*, QVA 814-33 (1833 QCVA), the master, Peter Lumpton, had William H. Hood, the wage claimant former steward, incarcerated for insubordination. Hood proceeded *in rem* and a libel was filed, following which protracted depositions ensued. In *The Amity*, QVA 880-34 (1834 QCVA), the wage claimant mariner, William Thompson, proceeded *in rem*, filing a libel alleging both deviation from the agreed voyage and unlawful incarceration by the master, John Gray, on charges of desertion. See, however, *The Sir Watkin*, QVA 747-33 (1833 QCVA), where the wage claimant mariner, Simon Hatch, proceeded *in rem* by summary petition. The first salvage suit to follow the new rules, pleading by act on

petition would return as the appropriate pleading in all but the most complex wage cases within a year of the adoption of the new rules.[1009] Libels would be the proper pleading in cases where a specific form of shorter pleading was not provided under the new rules, including suits in damages for assault, necessaries claims, passenger claims and Navigation Act disputes.

Furthermore, neither a summary petition nor a libel was now required to obtain an arrest, the affidavit to lead warrant being the new instrument, with the request for the arrest entered in the Action Book. As a consequence, in run-of-the-mill wage claims, the new tendency before the

petition, was *The Sussex*, QVA 906-34 (1834 QCVA), where 13 members of the crew of the *Rolla*, en route from Liverpool to New York, came to the assistance of the *Sussex* in peril in the Atlantic Ocean. The master of the *Rolla* died before a claim could be filed. His crew salved several items and appurtenances of the *Sussex*, as well as her crew, prior to her sinking. Prior to sailing to Quebec with the salved items, the *Rolla* proceeded to New York where the crew of the *Sussex* were disembarked. Upon arrival in Quebec, the crew of the *Rolla* had the salved items arrested in an *in rem* suit by act on petition. In *The Alceus*, QVA 1059-35 (1835 QCVA), an *in rem* salvage claim was taken by Moyse Morin, a Rivière-du-Loup notary, against cargo he had arranged to remove from a ship which had stranded locally in the ice. For unknown reasons, the claimant's proctors filed a bilingual libel, the only one seen in the vice-admiralty record, whereas an act on petition would have sufficed.

[1009] As from the fall of 1834, the summary petition was once again used in wage claims. But in more complex cases a full libel could be filed. See for example, *The Louisa*, QVA 981-35 (1835 QCVA), where the wage clamant second mate, Henry Waters, alleged having been disrated and then abandoned in New York by the master, Henry Nicholass. Waters made his way to Quebec as a member of the crew of another vessel. There he found the *Louisa* and had her arrested and filed a libel. Nicholass had Waters arrested for desertion and then pleaded insubordination and drunkenness on the part of Waters. Unfortunately for Waters, the court sided with the master. See also *The Félicité*, QVA 1000-35 (1835 QCVA), a suit for wages involving a steamboat. The four claimant engineers and mariners obtain the sale of the *Félicité* but then face two mortgagees. The court finds in favour of the claimants, whose maritime lien took precedence over the lenders. In both of these somewhat novel cases, a full libel was filed by the claimants. The libel in *The Félicité* is in French. In *The David*, QVA 1022-35 (1835 QCVA), the wage claimant second mate, John Baker, alleged that the master, Thomas Thompson, had unjustly accused him of drunkenness. The master's proctors moved that a libel be filed and the claimant's proctors complied. The vessel was arrested but sailed while under arrest. In *The St. John*, QVA 1033-35 (1835 QCVA), the wage claimant mariner, John Smith, alleged having been injured on board, falling from the rigging when a rope parted, whereas the master, James Davidson, alleged prior injury. The claimant proceeded *in rem*, filing a libel, and obtained judgment in his favour. The master's proctors filed for an appeal. They also contested the award of costs as they argued the claimant should have applied for wages to a Justice of the Peace, pursuant to the *Merchant Seamen Act*, 1835 (U.K.), 5 & 6 Will. IV, c. 19, s. 15. This novel argument was dismissed, but the record ends without news of the appeal. In *The Lord Wellington*, QVA 1057-35 (1835 QCVA), the proctors for the defendant master, Thomas Brown, moved the court to order the six claimant mariners to file a libel, and their proctor complied. The *in rem* suit appears fairly simple, and a summary petition would likely have been acceptable. Furthermore, summary petitions were filed in wage claims even where the proceedings were complicated. See *The Agnes*, QVA 1058-35, 1 Stu. Adm. 53 (1835 QCVA), wherein the ship's mate, John Bessin, proceeded in the Provincial Court of Gaspé by seizing the vessel and her cargo, wrecked at Malbay, sometimes called Murray Bay, and garnishing sums due to her master, John Taylor. Bessin's action was dismissed and he then filed a fresh suit in the Quebec Vice-Admiralty Court, this time arresting the vessel. Protracted pleadings ensued, but Bessin's proctors filed a summary petition and were eventually successful. Henry Black, an advocate at the time the claim was filed in the vice-admiralty on December 7, 1835, but confirmed as the new vice-admiralty judge on September 21, 1836, rendered judgment on October 18, 1836, awarding wages, but denying Bessin his costs, agreeing with the proctors for the defendants, that Bessin could have applied to a Justice of the Peace under the *Merchant Seamen Act*.

vice-admiralty was to consider the affidavit to lead warrant as a form of summary petition, in the sense that it stated that wages had been earned and remained unpaid. It thus became common in simple cases to issue no summary petition and no libel, and for the parties to plead to the statements made in the affidavit to lead warrant.

Consequently, the 1832 Rules brought the instance procedure of the vice-admiralty courts into line with that of the High Court of Admiralty, where, since 1801, an arrest required an affidavit to lead the warrant of arrest.[1010] But ever since the creation of the High Court of Admiralty in the 1500s, arrest had been the tool initiating every suit in admiralty. And each arrest was obtained by making an entry in the Warrant Book, thereby obtaining a warrant of arrest without the intervention of the admiralty judge. This system was reproduced by the 1832 Rules. Rule 7 stated that each suit was to commence "with an entry by a proctor in a book to be kept in the registry for that purpose, called the Action Book." Sample pleadings were set out in an appendix to the rules.[1011]

As explained above, the first Action Book of the Quebec Vice-Admiralty Court commenced in July of 1832, upon the entry into force of the new rules.[1012] This new process removed any need that may previously have existed of the claimant's proctor seeking the consent of the admiralty judge to obtain a warrant. But the former procedure had also permitted the claimant to request the consent of the judge to proceed *in forma pauperis*. Although not abolished by the 1832 Rules, that process would disappear in vice-admiralty suits within a year of their coming into force.[1013] A probable explanation is that the new rules allowed for summary process in wage

[1010] See the text accompanying note 355 above.

[1011] The appendix, published in 1833 to accompany the publication of the 1832 Rules, contains more than 240 forms, many in great detail. There exist, in the National Archives at reference HCA 30/814, two manuscript drafts of supplementary comments prepared in March 1832 to accompany the publication of the rules and forms. These comments were prepared prior to the adoption of the 1832 Act, and may have been published, although if they were, copies are difficult to find.

[1012] See the text accompanying note 494 above.

[1013] From July 1832 to July 1833, there were ten suits commenced seeking *in forma pauperis* status for the claimant, either in the old style of summary petition, or in some hybrid form in an affidavit to lead warrant. See *The Alchymist*, QVA 731-32 (1832 QCVA), *The Alexander*, QVA 735-32 (1832 QCVA), *The Gaspé*, QVA 744-32 (1832 QCVA), *The Jessy*, QVA 748-32 (1832 QCVA), *The Ann & Mary*, QVA 751-32 (1832 QCVA), *The Thomas Ritchie*, QVA GG^2-32 (1832 QCVA), *The Bee*, QVA 756-33 (1833 QCVA), *The Osprey*, QVA 761-33 (1833 QCVA), *The William Pitt*, QVA 764-33 (1833 QCVA) and *The Harvey*, QVA 776-33 (1833 QCVA). These claims were either wage claims or claims in damages for assault, filed by mariners or passengers. The pauper status was granted in each case, but no suit proceeded *in forma pauperis* between *The Harvey* and the end of the period under review.

claims, and requesting special dispensation from the usual rigors of admiralty process may no longer have been necessary. Further, the adoption of the *Merchant Seamen Act* in 1835 would reinforce the summary nature of wage claims by allowing mariners with wage claims of up to 20 pounds to proceed before Justices of the Peace, presumably in more remote areas where vice-admiralty courts were less accessible.[1014] Most wage claims were for less than that amount.

The 1832 rules would become the code of procedure in the Quebec Vice-Admiralty Court until the end of the period under review. The reform of the rules of practice adopted for the High Court of Admiralty between 1855 and 1860 would eventually lead to similar changes in the vice-admiralty courts, but not before the end of the period under review. Perhaps more significant was the adoption of the *Admiralty Court Act, 1854*.[1015] The legislation was intended to simplify English admiralty procedure at a time when rules of court were not yet common in admiralty. Section 13 stated that a suit against a ship, freight or goods would no longer require that the claimant sue out a warrant of arrest, but rather he could proceed against the owners of the object by serving upon them personally a monition citing them to appear and defend the suit. The Act does not use the terms, but its object was to allow claimants to proceed *in personam* instead of *in rem*.

The terms *in rem* and *in personam* hardly appear in the pleadings. There is no doubt that the terms were well known to the admiralty judge and to the advocates appearing before him. There are references to both terms in the notes taken by the judge during argument and in the reasons issued.[1016] But it is interesting to note that the term *in rem* only actually appears in the pleadings before the Quebec Vice-Admiralty Court in three cases, each time in the libel filed, and each time in a suit claiming necessaries supplied to ships.[1017] It is to be recalled that the term *in rem*

1014 *Merchant Seamen Act*, 1835 (U.K.), 5 & 6 Will. IV, c. 19, s. 15.

1015 *Admiralty Court Act, 1854* (U.K.), 17 & 18 Vict., c. 78.

1016 That notes during argument were taken is beyond doubt, and in at least one wage case there are detailed notes of argument on motions to quash for irregularity and lack of jurisdiction. See *The John Porter*, QVA 545-29 (1829 QCVA), where the wage claimant mariners, Nils Christian and Henry Cold, demonstrate their resolve by making three attempts to obtain their wages. The argument before Mr. Primrose, sitting as a surrogate, on the contestation of the first attempt is fully reported. See the text accompanying note 984 above. The argument before Justice Kerr on the later objection to jurisdiction contains references to the *in rem* and *in personam* jurisdiction of the court. Justice Kerr refers to *in rem* jurisdiction in reported cases as well. See *The Camillus*, QVA 303-23, Stu. K.B. 158 (1823 QCVA). See also *The Georgiana*, QVA 510-28 (1828 QCVA), reported in the *Quebec Gazette* on July 24, 1828.

1017 See *The York*, QVA 119-14 (1814 QCVA), *The Lively*, QVA 236A-20 (1820 QCVA) and *The Antoinette*, QVA 255-21 (1821 QCVA).

was first used in the seventeenth century to describe claims for necessaries supplied to a ship and that the concept of suing a ship for such claims, as opposed to a shipowner, was referred to in the 1633 settlement between the admiralty and common law judges, as well as in the Interregnum legislation and in the admiralty jurisdiction bills unsuccessfully proposed to Parliament.

The term *in personam* is completely absent from the pleadings in the vice-admiralty records in Quebec. That the term was known is obvious from the reasons given by the admiralty judge in reported cases. However, the absence of the term begs the question as to what was understood as being the purview of the admiralty courts as concerns persons or bodies corporate.

THE *IN PERSONAM* ENIGMA

The accepted theory is that the English admiralty court had exercised personal jurisdiction in Clerke's time, but had somehow lost jurisdiction over persons by the beginning of the period under review, and thus that *in rem* actions became the procedural means of compelling shipowners to "voluntarily" attorn to the admiralty jurisdiction. That theory gave rise in turn to the theory that the voluntary appearance of the owners of the *res* superimposed an action *in personam* on an action *in rem*, thus binding the owner and his entire assets personally to the judgment to be rendered against the ship, regardless of its value.[1018]

But for this theory to be confirmed would require an absence of *in personam* suits in the admiralty records. The term *in personam* is usually understood in its Roman law sense of being an action by one person against another. But note that the term *in rem* is not used in admiralty in its Roman law sense of being an action for the possession of or title to goods. Rather, in admiralty, *in rem* is a manner of proceeding directly against the goods that are the subject of the suit. Suits in admiralty may have started out as described by Clerke in the 1500s, whereby any property of the defaulting defendant could be arrested, somewhat like the attachment in modern American maritime law. But during the course of the seventeenth century they evolved into suits for services or necessaries rendered to ships, where the arrested property had to be related to the claim being made, and by the beginning of the period under review, the property to be arrested in each suit had to be related to the claim being made.

Thus the commencement of each suit in admiralty required the arrest of the subject of the action, and could result in the voluntary attornment *in personam* of the owner of the arrested property. But was the admiralty courts' *in personam* jurisdiction limited to the voluntary attornment of persons interested in arrested property? Although the early civilian writers may not have used the Roman law terms to describe admiralty suits, can it be assumed that all admiralty suits involving persons as parties would be *in personam* proceedings, as that term is understood today? The question requires reflection for two reasons.

[1018] See the discussion of *The Dictator* in the text accompanying note 10 above.

First, the evolution from suits as described by Clerke to suits against the ship or property involved in the dispute was a gradual, if important change. There is no reason to conclude that personal suits could not equally have been developing. The clause in the 1633 settlement describing suits taken against the ship in a building, repairing or supplying dispute, as not being taken "against any party by name", could indicate that other types of suit involved personal defendants. And the clause in the draft legislation in 1685 concerning *in rem* process in wage suits, indicates that the former practice could still have continued for other types of claim.

Secondly, the fact that modern *in personam* suits are served on the persons named in the suit, without involving the arrest of those persons, provides no assurance that personal process in admiralty during the period under review in this enquiry, if indeed it existed, was as it is now. Could personal suits in admiralty proceedings have evolved in a manner similar to *in rem* suits? It is to this question that the review of the admiralty records for the period under review must now turn. With a special focus on personal suits.

But this begs the question as to what is a suit *in personam*. In modern parlance, a suit *in personam* is simply a civil suit taken against a person or body corporate. Since the abolition of mesne process and of *contrainte par corps*, no civil action in virtually any court involves the arrest of the defendant, but rather affects the defendant's assets upon execution of a final judgment. But the term *in personam* is not used in other courts, as it is unnecessary to describe an action as being personal in a court where no other option exists. It is only in admiralty courts that the claimant has the option of taking suit *in rem*, and thus where suits *in personam* are to be differentiated.

It is today possible in an admiralty court to take suit *in rem* without actually arresting the defendant property. As has been seen, this is the case where the defendant shipowner acknowledges the action to be *in rem*, without the necessity of physically arresting the ship, or even obtaining a warrant of arrest. In these cases, the lawyers for the parties agree to accept service of the claim as being served *in rem* without being arrested, in exchange for security voluntarily given to allow the ship to continue its trade without delay. It also occurs where an action is prepared *in rem* and served on the defendant ship, without demanding security and without a warrant of arrest being obtained. The advantage of filing and serving the action *in rem*,

even in absence of obtaining a warrant or security, is that the defendant vessel will be liable for the execution of the judgment, whether or not it is sold during the procedures, even where the claim does not give rise to a maritime lien.

But it is not possible today to obtain a warrant of arrest of anyone or anything in any admiralty suit that is solely *in personam*. The question thus becomes whether, and to what extent, it ever was possible. Was the former practice of obtaining a warrant in admiralty for the arrest of the perpetrator of an assault on board ship in a civil action for damages a suit *in personam* or, because of the issuance of an arrest, a suit *in rem*? The answer may very well explain why these terms were so rarely used in admiralty pleadings during the period under review.

One is tempted to conclude that, regardless of the possibility of arrest before or after judgment, a suit in admiralty against a personal defendant is a suit *in personam*, much as was a suit in the English, French and Quebec courts, when arrest by mesne or final process or by *contrainte par corps* was available. These actions may not have been described as being *in personam*, but they were surely not suits *in rem*. Neither term even existed in the general civil courts of England, France or Quebec. Nor were the terms used in the pleadings before their admiralty courts.

However, regardless of nomenclature, it should be no more surprising that admiralty courts would have developed the power to arrest a defendant in a civil suit, than the similar power of the general civil courts of the day. What might be more surprising, would be the possibility that admiralty courts could arrest property in a suit for personal liability for assault, or that they could arrest persons in a suit that gives rise to the liability of property.

Assault and Contempt

British admiralty courts had traditionally exercised jurisdiction over offenses committed at sea in times of war and in times of peace. Each of these categories allowed the admiralty courts to punish the offender personally. War offenses would either be handled by the prize side of the court, or, if criminal in nature, by the admiralty sessions in the Old Bailey, or, later, by the provincial quarter sessions in Quebec, none of which is the precise focus of the present enquiry.

However, instance admiralty courts could hear certain suits of a penal nature, for the breach of special legislation, such as Navigation Act suits, piratical goods suits and slave trade suits, as

well as suits for the overloading of passenger vessels. They could also hear civil suits where mariners or passengers had been involved in some activity of a criminal nature on board. This could include claims resulting from desertion from the navy,[1019] stealing of cargo[1020] or even sexual assault.[1021] Civil suits in admiralty arising from crimes committed on board include suits for damages suffered by the victim, or by an accused offender, if subsequently acquitted. As well as suits based on treatment subjected upon mariners or passengers falsely accused of crimes on board.

In *The Friends*,[1022] a passenger, John McGrane, was accused of having murdered a child on board. The master had him detained and taken to criminal court in Quebec. McGrane was acquitted by the coroner's report. He then filed suit *in rem* in the vice-admiralty, seeking damages for assault. However, the court declined jurisdiction as the actions complained of took place in the port of Quebec, not on the high seas. In *The Ajax*,[1023] the claimant had been accused of a theft he apparently did not commit, and had been flogged at sea. His vice-admiralty suit, taken *in rem* in damages for assault, was within the court's jurisdiction.

Contempt of court could also be of a quasi-criminal flavour where, for example, a judge is insulted or even attacked in open court. Civil contempt is the deliberate disobedience of an order of a court or breach of an undertaking given to the court. In all cases of contempt, the court can punish the wrong-doer by imprisonment or fine. These actions are also taken against the person. Lord Coke in his Institutes claimed that only superior courts of record could condemn for contempt and that the admiralty court was neither a superior court, nor a court of record.[1024] However, the record of the prize and instance courts of admiralty in England and in Quebec demonstrate that this was not the case and, in fact, the admiralty and vice-admiralty courts continuously exercised jurisdiction to punish parties for contemptuous behaviour. Fleetwood, in

[1019] See *The Dryad*, QVA 52-10 (1810 QCVA), where deserters were harboured on board.
[1020] See for example *The Breadalbine*, QVA 116-14 (1814 QCVA), where mariners were accused of stealing part of the cargo.
[1021] See *The Agnes*, QVA 623-30 (1830 QCVA), and the text accompanying note 909 above.
[1022] *The Friends*, QVA 1150-37, 1 Stu. Adm. 112 and 118 (1837 QCVA).
[1023] *The Ajax*, QVA 714-31 (1831 QCVA). See the text accompanying note 936 above.
[1024] See *supra*, note 292.

his treatise written prior to both Clerke's and Coke's, refers to the court having contempt jurisdiction.[1025]

Punishment for contempt could be said to be personal, in the sense that it is against the person committing the offence, but it could not be said to be *in personam* process as opposed to *in rem* process. It is in fact not a civil process at all, but is rather a penalty imposed by the court *ex officio*. There can be no *in rem* process for contempt. Consequently, contempt of court cannot be the focus of the present enquiry any more than penal proceedings.

But the majority of suits in damages for ill-treatment are for some injury suffered on board ship by the claimant and thus within the instance jurisdiction of the court. They include unlawful punishment meted out by the master to a mariner or passenger, but more generally relate to violence taking place on board ship, causing injury to the victim. Out of the more than 3,000 Quebec vice-admiralty files extant during the period under review, more than 400 suits involve allegations of a master, mate or another mariner assaulting a mariner or passenger. These cases concern various evils, as has been illustrated.[1026]

From a procedural point of view, claims in damages for injury suffered on board differ from the more common marine civil suit. A suit in damages for assault or battery is not usually drafted to include as a party the ship upon which the incident took place. Rather, the suit is taken by the claimant, typically a mariner, directly against the defendant master, mate or mariner. In the vast majority of all other vice-admiralty suits, the ship, cargo or freight was traditionally a named party in each pleading. Consequently, the claimant in a suit for civil damages does not seek the arrest of the ship upon which the assault allegedly took place, but rather the arrest of the person having committed the assault.

The *in rem* procedural rules applied nevertheless to the arrest of the defendant. The petition would seek the issuance of a warrant for the arrest of the defendant. Following the coming into force of the 1832 Rules, the claimant's proctor would enter in the Action Book the nature of the claim as one in damages for assault and battery and would obtain a warrant for the arrest of the defendant. The defendant would be taken into custody by the marshal and would only be

[1025] See *Hale and Fleetwood*, *supra*, note 41, at page 141.
[1026] See the text accompanying notes 887 to 897 above.

released upon filing security in the form of a stipulation, called a bailbond in the 1832 Rules. The action would then follow the usual process and would result in a decree of damages enforceable against the defendant and his bail.

It appears logical that the assaulting defendant would be personally liable for his violent actions on board, and that the shipowner would not. But the cornerstone of these suits, like all vice-admiralty suits, was the issuance of an arrest warrant and the obtaining of security in exchange for the release from arrest. It could thus be said that suits in damages for assault were *in personam* suits. They were certainly civil suits taken against a personal defendant and not a ship, cargo or freight.

Suits in damages for assault or battery were common throughout the period under review in England and in Quebec. It is likely that the jurisdiction had existed continuously from Clerke's, and even Fleetwood's time, but these remedies are not easily distinguished from the criminal jurisdiction of the court at that time, which was also personal. In order to determine the limits of the personal jurisdiction of the court, one need also review the suits for which *in rem* process was available, to determine whether *in personam* process was also an option.

Assault and battery on board ship required the personal involvement of the defendant, whether he be the master, a mate, another mariner, a pilot, a passenger or even the shipowner. There are numerous cases where suits in damages for assault result in the arrest of these categories of defendant. There are also numerous cases where a claimant mariner seeks his wages as well as a separate sum in damages for assault, resulting in the arrest of the ship and of one of these categories of personal defendant. But in each case it could be argued that the arrest of the ship is on the wage claim, and the arrest of the personal defendant is on the assault claim.

There are many files in the Quebec vice-admiralty archive where the claim is solely couched in damages for assault, but only one such suit has been found where not only the violent master or mate, but also the ship itself appears to have been arrested. The case is *The Mary*,[1027] wherein the claimant mariner, John Mullins, alleges having been beaten by both the master and mate, Thomas Legatt and John Cunningham, and has both men arrested on August 8, 1814. There is no

[1027] *The Mary*, QVA 130-14 (1814 QCVA).

indication that wages or other amounts were claimed, or in fact due to the claimant. But the record is very short, perhaps given a quick settlement if the *Mary* was ready to sail, or perhaps due to weak evidence having been presented in support of the claim.

On August 25, John Fletcher, the proctor for the claimant, informs the court that his client does not intend to continue the suit. The warrants of arrest issued in the case have not survived. However, the record indicates that the court had been informed on August 8 that the ship was arrested along with the defendant master and mate. There is no other suit in the archive where assault is the sole motive for the arrest of a ship or other property.

But could the more common marine civil suit in vice-admiralty, for what would be considered an *in rem* liability, also give rise to personal liability and the arrest of the master or owner of the defendant ship? According to the traditional view of the English common lawyers at the beginning of the period under review, the admiralty courts had no jurisdiction over persons in such cases.[1028] This is part of the reason why prohibitions had become so popular in the 1600s.

The admiralty courts could hear suits for damages suffered at sea, and claims for wages and other maritime claims arising at sea, because even though the hiring of the mariner usually took place on land, his claim for wages arose from services rendered at sea. But in no case were the common lawyers ready to concede admiralty jurisdiction over persons responsible for the wrongdoing ship, such as the master or owner, even for claims that were naturally within the purview of the admiralty.

The theory of the lack of personal jurisdiction leaves *in rem* process as virtually the sole jurisdiction of the court, and the common law position was that, absent voluntary attornment by the defendant, there was no personal civil jurisdiction in admiralty, except where the intentional acts of the defendant might have led to an assault on board ship or contempt in the face of the admiralty court.

The theory that an *in rem* claim was the admiralty courts' way of forcing the owner or other person interested in arrested property to appear voluntarily, led Sir Francis Jeune to the

[1028] See *Johnson v. Shippen*, (1703), 2 Ld. Raym. 982, 91 E.R. 154 (K.B.), and the text accompanying notes 28 and 976 above.

conclusion that *in rem* process was but a procedural tool to compel that appearance, resulting in the personal unlimited liability of the appearer, regardless of the value of the arrested property.[1029]

The *Admiralty Act, 1854*

Regardless of whether one defines *in personam* jurisdiction to include the arrest of masters and mates in suits in damages for assault at sea, it is certain that the *Admiralty Court Act,1854* changed the way English admiralty suits could be initiated.[1030] From then on, suits previously commenced *in rem* by the arrest of the *res*, could be taken against the owners of the *res* by serving upon them personally a monition citing them to appear and defend the suit. The monition would not be an order to the marshal to arrest, but rather an order to the marshal to cite the owners personally to appear. Should the owner fail to appear following proper service, the court was empowered by the Act to proceed to hear and determine the suit and make any order or judgment required, which would include allowing execution against the *res* or any other property of the defendant.

The 1854 legislation marked the true beginning of the modern *in personam* jurisdiction of the admiralty courts. From then on in England, claimants would have the option of commencing their suit against the *res*, or against the owner of the *res*. It is noteworthy that the final English Warrant Book, which by then was called an Action Book, covering the 638 suits commenced during the 14-month period between the end of October 1858 and the end of December 1859, contains no suit where a person is arrested and only 14 suits where a person was monished, representing only 2% of all suits commenced.[1031]

But in several of the 14 suits, proceedings were first commenced *in rem* and later re-issued *in personam*, perhaps reflecting the novelty of the 1854 change.[1032] In fact, the 1854 changes were

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[1029] *The Dictator*, [1892] P. 304, 7 Asp. M.L.C. 251. See the text accompanying note 18 above.

[1030] *Admiralty Court Act, 1854* (U.K.), 17 & 18 Vict., c. 78, s.13. See the text accompanying note 1015 above.

[1031] The judicial statistics confirm this tendency, with only 5% of all admiralty suits taken *in personam* between 1858 and the merger of the courts in 1875. See *supra*, note 630.

[1032] With more than 10 suits entered each week in the Action Book, it is easy to conclude that the enactment of the *Admiralty Court Act, 1840* and the advent of steam navigation resulted in an increase in instance admiralty business. The Action Book is found in the National Archives at HCA 3/80. Of the 14 *in personam* suits, all but three were suits for damages resulting from a collision. In three collision cases, suits were fist issued *in rem* and then re-issued by monition against the owners of the offending ship. See *The Melbourne*, entered *in rem* on

concurrent with the new rules that were being introduced in the High Court of Admiralty. Since the enactment of the *Admiralty Court Act, 1840*, the judge of the admiralty had been empowered to make rules for the court, and between July 1854 and November 1959 Dr. Lushington made a series of rules, culminating in the 1860 Rules discussed above.[1033]

The year 1860 also marked the end of Warrant Books or Action Books for instance business in the High Court of Admiralty and no further records were used precisely for the obtaining of warrants of arrest, even in traditional *in rem* suits. Bound Act Books ceased to exist in 1749, and unbound minutes of acts in 1752.[1034] The 1860 Rules provide that the claimant's proctor was to file a præcipe and the court officer would make an entry in the Cause Book and issue the warrant. The Cause Books were destroyed in 1915 as being of inferior value to the Minute Books, but the latter records, like the Assignation Books they replaced, were restricted to reporting proceedings in open court and make no specific reference to arrests or the issuing of warrants. The first Assignation Book entry for a suit usually referred to the warrant being returned into court, but did not specify the nature of the warrant or against what or whom it was issued. This practice was continued in the Minute Books, although entered on a file-by-file basis, as opposed to the chronological Assignation Books.

To determine the object of the arrest would require a review of the original returned warrants held in the National Archives, but the collection is incomplete.[1035] The best evidence of the issuing of warrants is found in the Warrant Books and Action Book, and possibly from 1860 in

November 12, 1858 and *in personam* on November 19, 1858, *The Derwent*, entered *in rem* by the owners of the *Lord Panmure* on January 10, 1859 and *The Lord Panmure*, entered *in rem* on January 13, 1859 and then again entered *in personam* on May 5, 1859, both by the owners of the *Derwent*, and *The Clementine*, entered *in rem* on November 8, 1859 and *in personam* on December 1, 1859. In *The Perseverence*, collision damage proceedings were entered *in personam* by the owners of the *Ava* on June 4, 1859 and entered *in personam* by the owners of the cargo on board the *Ava* on June 14, 1859. Similar multiple pleadings are found in two salvage claims, *The Eastern Monarch*, entered *in rem* on June 8, 1859, again *in rem* on July 4 1859, a third time *in rem* on July 16, 1859 and finally *in personam* on November 11, 1859, and *The Campbell*, first entered *in rem* by the owners of the *Foyle* on November 22, 1859 and then *in personam* on November 24, 1859. *The Eastern Monarch* is reported at (1860), Lush 81, 167 E.R. 43 and *The Campbell* is reported at (1860), Lush 10, 167 E.R. 5. Another collision case giving rise to *in personam* process, *The Livingston*, entered *in personam* on March 28, 1859, is reported at (1859), Swab. 519, 167 E.R. 1243. There is also one wage claim, *The Glenmanna*, entered *in personam* on July 7, 1859, where both the master and the owner were monished. The persons usually monished in *in personam* suits were the master or owners of the colliding ships and, in *The Clementine*, *supra*, the trustee of one of the owners.

[1033] See the text accompanying note 574 above.

[1034] The final bound Act Book, covering 1744-49, is in the National Archives at HCA 3/74 and the final unbound minutes of acts in 1752 is at HCA 3/229.

[1035] The extant warrants are mostly found in the National Archives at HCA 39, but some are also at HCA 24.

the Cause Books, which were unfortunately destroyed. But that still leaves a gap between the last Warrant Book, ending in October 1774 and the Action Book covering October 1858 to December 1859. During that period, there is no one English record revealing the object of warrants issued. And the reporting of cases only began in 1798.

One does, however, get a glimpse of the number of arrests issued between 1793 and 1832, and again between 1841 and 1866 from two reports to Parliament. The first, tabled in 1833,[1036] tabulates the number of causes tried by the High Court of Admiralty between 1792 and 1832. The report does not specify whether the figures are only of suits heard, or of all suits initiated, but refers to suits tried, and thus others might have been initiated but not heard. The figures are impressive, with a total of more than 27,000 suits heard over the four decades, but reflect both instance and prize business, unlike the Warrant Books which were for instance business only.

The court's prize business was enormous during the wars with the French, between the French Revolution and 1815, with the combined workload of the court resulting in more than 1,000 suits tried per year. In 1806 an incredible 2,286 causes were tried over 115 court days, averaging almost 20 heard per day! Between 1816 and 1832, the figures fell to less than 80 suits heard per year, as prize business subsided. The report makes no mention of *in rem* or *in personam* claims.

Henry Rothery, the admiralty registrar, replies to a similar request of the House of Commons in 1867.[1037] Rothery notes that over the 26-year period between 1841 and 1866, no less than 9,894 suits had been initiated, an average of more than 380 per year. It is not stated whether this includes prize business, but from the categories mentioned by Rothery, it is clearly instance work. England was involved in various wars over this period, but not in European sea wars, and the court's docket was doubtlessly dominated by instance suits. Nor does Rothery specify what court record he consulted to arrive at these figures. There were no Warrant Books for these years, but he would have had at his disposal, records of fees paid and proceedings taken. Rothery was not asked whether the object of each arrest issued was property or persons, or even whether, since the enactment of the 1854 legislation, suits initiated were *in rem* or *in personam*.

[1036] See *supra*, note 630
[1037] See the text accompanying note 631 above.

Turning to the reported caselaw in admiralty, there are indications of the development of *in personam* process in England. Dr. Lushington, admiralty judge from 1838 until the end of the period under review in 1867, made several pronouncements on *in personam* process, one of which should be considered. In *The Volant*,[1038] a collision case decided before the enactment of the 1854 legislation, Lushington was asked to consider whether a suit *in personam* could be grafted on a suit originally commenced *in rem*. The owners had appeared voluntarily and given bail for the value of the *Volant*, but that sum was much less than the damage incurred. Could the court enforce the payment of damages by the appearing owners beyond the value of the *res*? Lushington refers to the earlier and apparently contradictory cases of *The Triune*[1039] and *The Hope*.[1040] He had decided the latter without being aware of Sir John Nicholl's decision in the former.

In *The Volant*, Lushington opined that, in former times, the claimant in a collision suit might commence a suit in admiralty either against the owner or the master *in personam* or against the colliding ship *in rem*. Indeed, the judge imagined cases where the ship might have sunk or otherwise become no longer available for arrest, and where the claimant would have no choice but to proceed in admiralty against the owner or master. The entire damage could be sought against the owners but, in absence of the ship, the claimants would have to depend upon the power of the owners to pay and to satisfy any attachment against them. By comparison, where the process is solely commenced *in rem*, and the owners, although not sued, appear voluntarily, Lushington opined that their resulting personal liability could not exceed the value of the *res* plus court costs. To make a master or owner liable beyond that value would require their being sued in first instance.

However, as underlined above, Lushington's reasons in *The Volant* were described as contradictory by Jeune in *The Dictator*, and were based, according to that judge, on the concept of trying to graft an action *in personam* upon an action *in rem*.[1041] Jeune was of the view that the voluntary appearance of the owners in an action *in rem*, led to the owners' full liability *in*

[1038] *The Volant* (1842), 1 W. Rob. 382, 1 Notes on Cases 503, 166 E.R. 616 (Adm.).
[1039] *The Triune* (1834), 2 Hagg. 114, 166 E.R. 348 (Adm.).
[1040] *The Hope* (1840), 1 W. Rob. 154, 1 Notes of Cases 110, 166 E.R. 531 (Adm.).
[1041] *The Dictator*, [1892] P. 304, 7 Asp. M.L.C. 251. See Jeune's comments at pages 316 and 319, pages 255-256 in Aspinall's report of the case.

personam for the amount of the judgment, notwithstanding the value of the *res* or of the bail put in to allow the *res* to be released. That this is the position in England and Canada today has already been explained.[1042]

The question of the *in personam* jurisdiction of the admiralty courts has been a vexing one. At the beginning of the period under review, the English Court of King's Bench had determined that the admiralty could proceed against a ship but not against her owner.[1043] But that was in a case of hypothecation of a ship, giving rise to liability without any personal involvement of the owner. Nevertheless, *Johnson v. Shippen* has repeatedly been referred to as evidence of a lack of personal jurisdiction of the admiralty courts. In *The Dictator*, Jeune reiterated this lack of personal jurisdiction of the court, citing similar dicta of Blackburn, J. in *Castrique v. Imrie*.[1044]

Jeune also referred to the dictum of Lushington in 1855 in *The Clara*, to the effect that the admiralty courts had not exercised jurisdiction by the arrest of persons since 1780.[1045] Lushington might be accused of issuing contradictory reasons during his judicial career, but could he be wrong on this point? He was the son of a proctor and, upon obtaining a D.C.L. degree from All Souls College, Oxford University, was admitted as an advocate at Doctors' Commons in 1808, at age 26.[1046] He became judge of the High Court of Admiralty in 1838 and would be president of

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[1042] See the text accompanying note 10 above.

[1043] *Johnson v. Shippen*, (1703), 2 Ld. Raym. 982, 91 E.R. 154 (K.B.). See the text accompanying note 28 above.

[1044] *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, at page 431.

[1045] *The Dictator*, [1892] P. 304, at page 313, 7 Asp. M.L.C. 251, at page 254.

[1046] G.D. Squibb, *supra* note 3, at page 198. Lushington's entry and signature appears on folios 64 and 126 of the subscription book of Doctors' Commons, a record of admissions from 1511 to 1855. The subscription book somehow escaped the great fire of London in 1666, and is today found at the Lambeth Palace library, reference DC1. In Doctors' Commons book of minutes of meetings between 1828 and 1865, it appears from a meeting of the trustees, held on January 16, 1865, that the original intent was to "present" the subscription book to the British Library, but that the Queen's Advocate moved that the "book of signatures" rather be "deposited for safe custody" with Lambeth Registry. The book of minutes is at Lambeth Palace Library, reference DC2. One final meeting of the members of the College would take place on July 10, 1865, approving the proposal of the trustees and the distribution of £78,000 amongst College members for the sale of Doctors' Commons. It was also decided that the content of a letter from Dr. Lee, dated June 21, 1865 would stand over for future consideration. Dr. Lee had been against the surrender ot the charter of the College, and was against the sale of the premises, but his letter would never be considered further, as the College never again met. See *supra*, note 572. For the debate over the fate of Doctors' Commons, see Squibb, *supra* note 3, at pages 102 *et seq*. See also Wiswall, *supra* note 9, at pages 88 *et seq*. Earlier records also survived the fire. The Doctors' Commons treaurer's or "long" book, containing minutes from 1679 to 1828, as well as much earlier treasury information, is in the National Archives, reference PRO 30/26/8. However, if minutes of meetings prior to the fire once existed, they were lost. From the subscription book, it can be seen that John Dodson was admitted on the same day as Lushington. The first entry for each new member was his promise to pay an annual fee, 6s 8d in

Doctors' Commons from 1858 to 1867, when he also resigned as judge of the admiralty, at age 85.

If Lushington and indeed Jeune were to be correct, it is to be assumed that none of the more than 27,000 suits tried by the prize and instance courts between 1793 and 1832, and none of the almost 10,000 suits tabulated by Rothery between 1841 and 1866 involved *in personam* arrest. But one should also see no reference to the arrest of persons in admiralty in the nineteenth century legislation, rules, literature or records of the courts. However, these sources are not easily reconciled with either judge's conclusion on this point.

In a case decided long before *The Clara*, Sir William Scott, later Lord Stowell, heard a claim for damages filed by a passenger in *The Ruckers*.[1047] The claimant passenger had the master arrested on a claim in damages for assault on the high seas. An objection was made to the jurisdiction of the court, as it was alleged that only a jury could evaluate damages. In the end, Scott held that the court had jurisdiction to hear the suit and upheld the arrest of the master. However, of note is the fact that he was unsure whether the court could hear the case, and asked the registrar to review the records to see whether similar cases had been previously heard. The registrar reported having searched the records as far back as 1730. It is likely that the records reviewed were the Warrant Books, and that the reverse end date was chosen, as prior to that that year the entries were in Latin. At any rate, the registrer reported that the court had indeed heard all kinds of similar assault damage cases and the objection to jurisdiction was dismissed.

The Ruckers was heard in October 1801. Scott had been admitted to Doctors' Commons on November 3, 1779.[1048] He had been appointed King's Advocate in 1788 and judge of the High Court of Admiralty in 1798. His apparent uncertainty as to the jurisdiction of the court to hear a claim in damages for the assault of a passenger clearly indicates that such claims had been rare, at least since 1780. However, *The Ruckers* does not question the jurisdiction of the court to hear claims of *mariners* against masters in damages for assault, and indeed Scott only questions the jurisdiction to hear a claim where there is no legal nexus between the claimant and the master.

Lushington's time, and the second was for each advocate to pay his entry fee, £20 from 1689 onward. See Squibb, at page 11. The last admission in the subscription book is that of Dr. Tristan on November 7, 1855.

[1047] *The Ruckers*, (1801), 4 C. Rob. 73, 165 E.R. 539 (Adm.).

[1048] See Squibb, *supra*, note 3 at page 194.

Nor does the ruling in *The Ruckers* confirm that there had been no personal arrests of masters during Scott's career. At least not on claims in damages for assault. Nor that no personal arrests had been issued during Scott's career on claims other than those involving the personal liability of the arrested defendant. The case does not reinforce the ruling in *The Clara* in this sense. It is also doubtful that the registrar needed to have searched all the way back to 1730. There are multiple cases of claims in damages against masters by persons of all professions in the Warrant Books, and masters were arrested in numerous cases for all types of claim. The final entry in the final Warrant Book for 1774 involves the arrest of the master in a wage claim. There are even more examples of both type of claim in the Action Books in Quebec.

But the terminology in the Warrant Books is not that used in more modern times. The first British author to make modern use of the terms *in rem* and *in personam* was Arthur Browne.[1049] His description of *in rem* proceedings at the outset of the nineteenth century constitutes the basis of admiralty jurisdiction in many countries, including the United States of America.[1050] Chapter IX, of the second volume of his treatise, covering the practice of the instance court, describes *in rem* process in detail at pages 396 to 432. However, in referring to *in personam* process at pages 432 to 435, Browne seems to defer to Clerke's sixteenth century *Praxis Admiralitatis*.[1051] Browne describes *in personam* process as virtually identical to process *in rem*, and that the warrant empowers the marshal to take the body of the person into custody, and to release him against security, much as he would for property.

Browne then explains that where the personal defendant appears, the process will be exactly as where a person voluntarily appears in a suit *in rem*. Security will be provided and the contestation follows the normal process. At any rate, in describing this process in his description of *in rem* process, Browne refers at each step to Clerke's *Praxis Admiralitatis*, leaving one to wonder to what extent Browne was relying on his own experience in the admiralty courts in Ireland. It should also be recalled that Clerke's text, regardless of its authority, was not written as an in-depth treatise and was never published during the author's life.

[1049] See the text on Arthur Browne, accompanying note 342 above.
[1050] See Browne, *supra*, note 195 and more generally on Browne's influence, see Professor Sweeney, *supra*, note 342.
[1051] *Praxis Admiralitatis*, *supra*, note 305.

Browne makes two surprising statements about arrest and security. First, he states that security for the appearance of the defendant was distinct from security for the payment of the eventual judgment. He states that should the personal defendant not appear after having provided security, a fresh warrant for his arrest would be required, as the security obtained is to the benefit of the admiral, not the claimant, and thus, with the exception of costs, will not compensate the claimant for his claim. Browne adds in a note that he has never heard of such a thing in practice. It would appear that his understanding, and perhaps the local practice in Ireland, was that security in admiralty was similar to security in mesne process at common law where, as has been illustrated, there was security above and security below. However, the review of the Warrant Books seems to confirm that the sole security provided was for the final judgment or decree, not for the claimant's appearance.

Secondly, Browne concludes his short comments on *in personam* procedure with a lamentation of the loss "in latter times" of the salutary practice in admiralty of attachment akin to foreign attachments, whereby a defendant who could not be found in the jurisdiction, would see his assets in the jurisdiction attached to compel his appearance.[1052] This statement, which is not attributed by Browne to Clerke or anyone else, has been of immense importance in the development of Rule B attachments in American admiralty practice and, even though it concerns *in personam* claims only, constitutes one origin of the theory that the true goal of *in rem* arrest in admiralty is to compel the personal appearance of the owner of the property arrested. But again, Browne would have benefitted from a review of the Warrant Books. There is certainly no reference to such a practice over the period under review, and it is suggested that Browne was confusing the practice in Clerke's day with later admiralty arrests.

It is true that Browne's practice was in Ireland and that, not having obtained his doctor of laws from Oxford or Cambridge, he was ineligible to join Doctors' Commons or to appear before the High Court of Admiralty, but it would seem that, if there had been a mandatory change made in that court in 1780 with regard to the jurisdiction to arrest individuals, he would have been aware of it. He does mention when reviewing contractual claims, that the general rule at the time of writing was that the admiralty court acts only *in rem*, but it is unclear in his treatise whether this

[1052] Browne, *supra*, note 195, vol. 2, at page 434.

was generally the rule. His description of *in personam* claims is based on the arrest of the defendant.

Three decades after the publication of Browne's treatise, the 1832 Rules, were adopted to align the vice-admiralty courts with the practice in London. Rule 7 stated that, upon an entry being made by the claimant's proctor in the Action Book, a warrant of arrest would issue, to arrest the property proceeded against, or the person in cases where personal arrest is lawful, adding "but personal arrest is never to be resorted to when the ends of justice can be otherwise attained." Certainly this rule confirms an intention to limit the use of personal arrest. And since, prior to the 1854 legislation allowing for personal action to be taken instead of proceedings *in rem*, all admiralty actions were still commenced by the issuing of a warrant of arrest, if the court had lost *in personam* jurisdiction, there would be no reason to refer to the arrest of persons at all.

Dr. Lushington stated flatly in *The Clara* that the arrest of persons was obsolete in 1855, but could he have been referring to the effect of the then recent 1854 enactment? Although Jeune quotes the dictum of Fry, L.J., in *The Heinrich Bjorn*,[1053] to the effect that personal arrest might still have been available in 1885, that dictum has been criticized, and does not represent the then state of the law. Further, *The Clara* was decided precisely at the time Dr. Lushington was putting together the rule changes that would affect admiralty practice. The new rules were completed in December 1859 and became the 1860 Rules. New rule 5 stated that the proctor desiring to institute a cause was to file in the admiralty registry a præcipe, and thereupon the cause was to be entered for him in the Cause Books, unfortunately destroyed in 1915.

Rule 28 of the 1860 Rules refers to section 13 of the 1854 legislation whereby a citation *in personam* could be issued, and rule 34 provides that the admiralty judge could issue judgment by default in an *in personam* suit, and enforce the payment thereof by monition and the attachment for contempt of the defaulting defendant. The procedure was one of contempt, and not paying the amount set out in the monition for execution could lead to the defendant's imprisonment, much as a *capias ad satisfaciendum* at common law. The same rule might arguably apply in *in rem* cases, if the owner were to appear but not satisfy the final decree, although it would probably be rarer still, as the *res* or bail would normally be available to satisfy the judgment.

[1053] *The Heinrich Bjorn* (1885), 10 P.D. 44, at page 54 (C.A.).

The 1860 Rules make no direct reference to the arrest of persons in a cause *in personam*, but neither do they state that no such remedy had survived. One of the leading English proctors, Henry Charles Coote, published a treatise on the new practice of the High Court of Admiralty in 1860.[1054] Chapter III concerns actions *in personam*. Coote states that in actions for wages, salvage, collision or other damages, the claimant may proceed against his debtor *in personam* and take out a warrant and arrest the body of the owner or master of the vessel against whom his action lies. Once the defendant files bail, the action then proceeds to sentence much as would an action *in rem*. This is precisely how Browne had described *in personam* process six decades earlier.

However, Coote then states that it would seem superfluous to say that personal actions in admiralty were obsolete in practice and, referring to Lushington's dictum five years earlier in *The Clara*, and to the restrictions placed on arrest on mesne process at common law, Coote suggests that the revival of personal arrest in admiralty would be "an offensive return to old ways and usages."[1055]

Coote refers to the *Admiralty Act, 1854* as having provided the admiralty courts with a more lenient form of exercising personal jurisdiction by proceeding by way of monition. But he is careful to argue that the 1854 legislation was not the sole source of the court's *in personam* jurisdiction, which existed previously.[1056] Where the defendant fails to appear to the monition,

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[1054] Coote, *supra* note 565. Coote also published a treatise on the practice of the ecclesiastical courts.

[1055] Coote, *supra*, note 565, at page 131. Coote was referring to the 1838 legislative restrictions. Arrest would be virtually abolished in 1869. But see the text accompanying note 420 above.

[1056] *Ibid*,. at page 132. In making the assertion, Coote refers to *The Meg Merrilies* (1837), 3 Hagg. 346, 166 E.R. 434 (Adm.), where a monition issued against the owner of the salved vessel, then at sea, to *The Rapid* (1838), 3 Hagg. 419, 166 E.R. 460 (Adm.), where a monition against the owners of salved property was dismissed, to *The Volant* (1842), 1 W. Rob. 382, 166 E.R. 616 (Adm.), a collision case discussed above, and to *The Chieftain* (1846), 2 W. Rob. 460, 166 E.R. 825 (Adm.) where a monition against the owners of salved property was refused after the property was lost. These cases were reported and there are no extant Warrant Books for the years in which the suits were initiated.The existing Warrant Books, as there name indicates, were maintained for the issuing of warrants of arrest. The change in name to Action Books, referred to in the 1832 Rules, might reflect the possibility that an action could be initiated without arrest in very limited circumstances. There are doubtlessly other cases in the Warrant Books where no warrant was eventually served, but it is not easy to identify them as every entry commenced with a request to issue a warrant. Of the more than 3,000 suits extant in the Quebec Vice-Admiralty Court, there are only six suits that appear to have been commenced without a warrant being issued. One concerns admiralty fees, and a request by court officers that a proctor be obliged to pay fees awarded in suits where he had acted for the party condemned. See *Mitchell v. Gugy*, QVA 482-27 (1827 QCVA). For more on Mr. Gugy, see *supra*, notes 734 and 737. Three of the other five suits are wage disputes, wherein the owners are cited, either due to their local presence, or to the absence of both ship and master. See *The Speedwell*, QVA 676-31 (1831 QCVA), *The Rebecca*, QVA 1330-39 (1839 QCVA) and *The*

the court pronounces him in contempt, but then proceeds to judgment, and the final decree leads to a monition to pay and attachment of the defaulting *in personam* defendant. Much like suits *in rem* where the final decree is not paid, the attachment of the *in personam* defendant would be endorsed with a *mittimus*, directing the committal of the defendant until his contempt is purged, i.e. until the judgment debt is paid in full.[1057]

Coote published a second edition of his book in 1869.[1058] The book was supplemented by the *Admiralty Court Act, 1861*[1059] and by the *County Courts Admiralty Jurisdiction Act, 1868*,[1060] and the County Court admiralty rules. The possibility of attachment in contempt of a person in default of respecting a final decree, whether *in rem* of *in personam* is repeated, but the chapter in the first edition on actions *in personam*, was now reduced to a two page note.[1061] There is no further mention of arresting the personal defendant, or reference to the comments of Lushington in *The Clara*. It is clear that by the end of the period under review, personal arrest in admiralty in England was truly obsolete, with the exception of attachment for contempt of court for failing to satisfy a decree.

But the volumes of Browne and Coote beg the question as to whether the admiralty courts ever actually exercised jurisdiction to arrest *in personam* defendants, other than in contempt proceedings or in suits arising from a violent act at sea, and, if so, when and how was it lost. Was Lushington correct in stating that it was lost in the eighteenth century? And, if then, was it at the beginning of the century as stated in *Johnson v. Shippen*, or at the end as suggested in *The Clara*? To explore the point requires a further review of admiralty court records.

Scotland, QVA 1643-41 (1841 QCVA). The fifth suit, *The Dominica*, QVA 742-32 (1832 QCVA), is a suit in damages for ill-treatment of a passenger. See the text accompanying note 927 above. The sixth suit, *The Bob Logic*, QVA 562-29 (1829 QCVA) was filed following the filing of a related suit, *The Bob Logic*, QVA 563-29 (1829 QCVA), for the same wages, but against different named defendants. Regardless of the reverse numerical order, in QVA 563-29, the alleged owners were arrested and security given. Following the sailing of the ship it was realized that another person was the true owner, and file QVA 562-29 was issued, seeking a citation of the true owner. The owner is not arrested but cited only, possibly because security was tendered by the defendant in QVA 563-29. These cases are so rare that it can be safely stated that an arrest was virtually always required to commence a suit in Quebec, and, at least until the 1854 legislation, in London as well.

[1057] Coote, *ibid*., at page 92.

[1058] H.C. Coote, *The Practice of the High Court of Admiralty of England*, 2nd (London: Butterworths, 1869).

[1059] *Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10.

[1060] *County Courts Admiralty Jurisdiction Act, 1868* (U.K.), 31 & 32 Vict., c. 71.

[1061] Coote, *supra*, note 1058, at pages 147-148.

Personal Arrest in London

As has been seen, the most reliable record of the issuance of warrants in admiralty during the period under review is the collection of Warrant Books or Action Books. This is the case for the Quebec Vice-Admiralty Court and for the High Court of Admiralty. There is a gap in these records for the High Court of Admiralty between 1774 and 1858, but that gap is filled, at least for vice-admiralty procedure, by the records of the Quebec Vice-Admiralty Court. Reviewing arrests *in rem* and *in personam* during the period under review requires a review of the records of both courts.[1062]

As has been explained, the concept of *in rem* process against the ship liable for the damages claimed was developed in England during the seventeenth century. At the end of the previous century, Clerke's writings indicate that arrest was already the backbone of admiralty procedure, but that it could be initiated against any of the assets of the defendant, not only the ship or property that was the subject of the action.

The concept of taking action against the ship that was the subject of the action would first emerge in the early seventeenth century and, commencing with necessaries claims, would appear in the 1633 settlement. In the Interregnum admiralty court legislation, and in the draft admiralty bills that were unsuccessfully proposed to Parliament up to 1685, claims related to repairs or necessaries provided for the arrest of the subject vessel. By the beginning of the period under review, that concept had widened into what was becoming *in rem* liability, associating arrest in all admiralty suits with the property that was at the heart of the dispute between the parties.

Although the vocabulary of *in rem* and *in personam* would not be used by writers until the beginning of the nineteenth century, the concept of *agere in rem* was recited to Parliament in 1663, when efforts were being made to avoid the prohibitions that plagued the admiralty court throughout the first half of the seventeenth century. Ship repairers and suppliers were directing their arrests against the ship they serviced. Thus it can be concluded that *in rem* vocabulary was associated with admiralty process throughout the seventeenth century, at least in necessaries claims.

[1062] As explained above, judicial statistics for the civil courts were not kept during the period under review, with the exception of the last decade, starting in 1858. Earlier reports to Parliament do not differentiate between *in rem* and *in personam* proceedings. See *supra*, note 630.

This crystallization of *in rem* process can be seen from the Warrant Books of the High Court of Admiralty at the outset of the period under review. Warrant Book volumes 52 to 80 cover the period from October 1699 to December 1859, with a large gap between the end of volume 78 in October 1774 and the beginning of volume 80, styled an Action Book, in October 1858. Volume 79 of the series is neither a Warrant Book, nor an Action Book.

From the beginning of volume 52 of the Warrant Book series, the object of the arrest in each entry is the ship or other property that was the subject of the action, not only for necessaries claims, but for all identifiable claims. The first entry in volume 52, dated October 24, 1699, concerns a wage claim by the crew of the *Olive Branch* and the arrest is of that ship, for services provided to that ship. Each subsequent identifiable entry is similar, in that the ship or property to be arrested is clearly the ship or property that is the subject of the claim.

There are in total 11,334 entries in volumes 52 to 78, and 80.[1063] However, of these, the cause of action in perhaps as many as 1,000 is not clearly identifiable, either because the entries make reference to no cause of action at all, or because they refer to the cause of action as being "civil and maritime" without more. It has been possible in many cases to trace claims through the corresponding Act Book entries, to decipher the precise cause of action, but often suits were settled, abandoned, or the ship simply disappeared before arrest could be effected, thereby leaving a cold trail as to the underlying cause of action.

The Quebec Vice-Admiralty Court records demonstrate that a reference to a claim as being simply "civil and maritime" had become associated in nineteenth-century practice, with a claim in damages resulting from some violent act of assault or battery on board ship. In virtually all of these cases, the arrest would not be of the ship, but rather of the perpetrator of the assault, usually the master, a mate or another crew member. Many of the High Court of Admiralty Warrant Book "civil and maritime" entries can be identified as assault cases as well, either through the corresponding Act Book entries, or, where the arrest is of a crew member and not the ship, because it would be difficult to imagine why else a mere seafarer would be arrested. But this does not explain the "civil and maritime" entries in the Warrant Books where the arrest is of

[1063] There were in total 11,466 entries in thes volumes, but 123 were struck out, in many cases due to errors in party or ship names, and often re-entered immediately.

the ship only. Where searching the Act Books leads to a dead end, the cause of action remains unknown.

Setting aside these mystery claims still leaves a large number of identifiable claims where *in rem* process appears to have crystallized. If one includes all of the suits entered in the High Court of Admiralty Warrant Books and Action Book during the period under review, the arrest of the subject ship occurs in close to 9,000 of these cases, the arrest of the subject cargo in 400 and of freight in less than 100. However, the latter two categories should be combined, as the arrest of freight was effected by the arrest of the cargo upon which the freight had been earned, and the entries referring to the arrest of freight probably resulted in cargo arrests. This leaves almost 2,000 entries, only 20 of which specified no object of the intended arrest. What was the object of arrest in these cases?

If one were to believe the reasons in *Johnson v. Shippen*, there could be no personal arrests, with the exception of suits in damages for assault, where the assailant alone was the defendant and thus was arrested under the rule that all suits commence with an arrest.[1064] But setting assault suits aside is insufficient to account for all of the remaining suits. Nor can necessaries claims, of which there are only approximately 50 in the English Warrant Books and Action Book, be of assistance in explaining the arrest tendency.

In fact, the remaining 2,000 or so entries involved solely personal arrests. From the very beginning of the period under review to the end of volume 78 of the High Court of Admiralty Warrant Books, there were not only 2,000 personal arrests entered, but more than 6,000. In 5,460 cases the master or a mate was arrested, either alone, or, in almost 4,000 suits, along with the ship or other property to be arrested.[1065] In 473 cases a simple mariner was arrested. In 385 cases, the vessel owner was arrested.[1066] Although these figures include the 1,000 or so identifiable assault suits, it is obvious that the arrest of persons was not limited to assault suits, and a review of the Warrant Books confirms on the contrary that personal arrest was available and enforced in

[1064] There were approximately 1,000 assault cases in the Warrant Books of the High Court of Admiralty during the period under review, with the uncertainty of number due to the many "civil and maritime" entries.

[1065] The breakdown is 5,212 entries where the master was arrested, 195 where the chief mate was arrested, and 53 where a lower mate was arrested.

[1066] These were the main categories of personal arrest, but not the only persons subjected to *in personam* process. Others included doctors, merchants, pilots, soldiers, a slave, a former hostage, a jew and even widows of masters or mariners.

the majority of claims falling under heads of jurisdiction of the High Court of Admiralty throughout the eighteenth century.

Personal arrest does not appear to have been available in cases of necessaries supplied to a ship, and in each of the approximately 50 suits for necessaries in the High Court of Admiralty during the period under review, only the subject ship was arrested. This confirms the early link between suits for necessaries and the ships benefitting from the service supplied. Similarly, bill of lading cases, for loss of or damage to cargoes carried, were only directed against the carrying ship or other cargo or freight, to the exception of personal liability. Suits on hypothecs such as bottomry or respondentia bonds were also by the second half of the eighteenth century directed solely against the ship or cargo they were issued to secure. However, during the first half of the century, such bonds gave rise to suits against not only the ship or cargo but also the master obtaining the security.[1067] Similarly, salvage suits were generally against the ship or cargo salved, but in certain cases could be taken against the master[1068] or owner of the salved property.[1069]

In virtually all other cases, the jurisdiction of the High Court of Admiralty could be exercised *in rem* against the property that was the subject of the action, or *in personam* against the person in charge thereof, usually the master of the ship involved, or, in mixed process, against both. Table 1 illustrates the overall numbers of High Court of Admiralty warrants entered in the Warrant Books and Action Book, and the percentage each represents.

Table 1: Arrest Warrants issued in the High Court of Admiralty 1699-1859:

In rem	Mixed	*In personam*	Total
4,984	3,992	2,358	11,334
44%	35%	21%	100%

These figures would change if Rothery's reply to the queries of Parliament in 1867 were to be factored in.[1070] Of the 9,894 causes reported by Rothery to have been commenced between 1841

[1067] See for example, *The Mary of Scarborough*, entered December 27, 1701, *The Neptune*, entered May 27, 1749, *The Supply*, entered December 8, 1749, *The Alderney*, entered October 26, 1751 and *The Bridlington*, entered September 19, 1753.

[1068] See for example *The Pearl Galley of London*, entered March 6, 1710. See also the cases cited *supra*, in note 1056.

[1069] Examples include *The Sardinia Galley*, entered June 13, 1710, *The Georgetown*, entered November 5, 1759 and *The Matty*, entered May 22, 1773.

[1070] See the text accompanying note 631 above.

and 1866, 6,211 were commenced prior to 1860. This would include the 638 suits entered in the Action Book of 1858-59. If one were to substitute Rothery's figures in place of the Action Book figures, the total number of cases to the end of 1859 would climb to 16,907 suits. Rothery was not asked how many suits involved arrest and, at least since 1854, some of the suits were processed *in personam* in the modern sense of the term, without any arrest being sought.

From the judicial statistics collected for the High Court of Admiralty from 1858, it appears that, between 1858 and 1866, there were a total of 4,739 suits initiated, 199 of which were *in personam*, representing less than 5% of all suits[1071]. But even if one were to assume all of Rothery's causes to involve *in rem* arrest, it would still leave more than 37% of all suits during the period from 1699 to 1859 involving *in personam* arrest.[1072]

By the end of the period and the arrival of steam navigation, companies were more often seen to be the owners of vessels, whereas individuals, often including the master, had previously been owners. But masters alone were the object of arrest *in personam* in 5,212 suits, representing 46% of all High Court of Admiralty suits entered in the Warrant Books during the period under review, and 49% if the 638 entries for 1858-59 are excluded. The Warrant Books contained, at the end of each volume, a list of sureties for arrested property and persons and it can be seen that warrants for the arrest of masters and owners were served, and the release of the person arrested was given, in exchange for security bonds, exactly as in the arrest of property.

But as has been previously noted, there is a gap in the High Court of Admiralty Warrant Books between 1774 and 1858. It is unlikely that any intervening books would have been lost, as the records of the court are otherwise complete throughout. However, it should be noted that the Act Books end in the middle of the seventeenth century as well. These changes were not due to

[1071] See Judicial Statistics 1858 through 1866. The percentage of *in personam* suits would only rise slightly between 1867 and the merger of the courts on November 1, 1875. During that period there were 3,571 admiralty suits initiated, more than 400 per year, of which only 250 or 7% *in personam* over the entire period. See *supra*, notes 630 and 1031.

[1072] Such an assumption is not accurate as, from 1854, between 5% and 7% were *in personam* suits, not involving *in rem* arrests. It is not possible to make a precise calculation, as judicial statistics on *in personam* suits between 1854 and 1858 were never collected, and no Warrant Books exist. Further, Rothery was not asked to provide this information. If Rothery's figures to the end of 1866 are used, the total number of suits rises to 20,590 and *in personam* arrests over the period 1699 to 1866 drops to 31%, even if one again assumes all 9,894 suits tabulated by Rothery between 1841 and 1866 to have required *in rem* arrests. The earlier statistics reported to Parliament in 1833 are more difficult to factor into any equation, as they included both prize and instance business.

linguistics, as the English language had been in use since Latin was abolished in 1733.[1073] It has been suggested that the abandonment of the old records was due to discouragement amongst the civilians, but the number of suits entered in all Warrant Books up to the end are significant, and would not appear to be a source of discouragement.[1074] Action Books had been mandated for vice-admiralty courts by the 1832 Rules. They might have been contemplated for the High Court of Admiralty, but none appear to have been created prior to 1858.

By the time an Action Book is finally started in 1858, the instance business of the High Court of Admiralty was at an all-time high. The Action Book for 1858-59 contains no less than 638 suits. As noted above, this is confirmed by Rothery's report to Parliament in 1867. It is also confirmed by the judicial statistics for 1858 and 1859. In all, there were 520 suits initiated in 1858 and 536 in 1859. Of these, only 3% were *in personam* suits each year.[1075] Over the period from 1841 to 1866, Rothery reported that there were 9,894 suits initiated, an average of 380 per year. However, it is noteworthy that no personal arrest appears in the Action Book for 1858-59 and none were likely issued in any suit reported by Rothery for the years after 1854.

Prior to 1854, all suits in admiralty commenced with the issuing of an arrest warrant. The 1854 legislation did not prevent the issuing of a warrant of arrest for *in rem* suits, but allowed suits to be taken *in personam*, even where the suit would previously have been taken *in rem*. It is however unclear whether the Action Book was required to be filled in where a personal monition or citation was sought but not a warrant of arrest.[1076]

In the Action Book covering the 14-month period between October 30, 1858 and December 30, 1859 there are 638 suits entered. However, of the 638 entries, there are 569 for 1859, whereas Rothery's figures arrive at 536 suits entered in 1859, 33 less than the Action Book for that year. Furthermore, there are 12 suits entered in the Action Book for 1859, wherein a master or owner

[1073] See *supra*, note 754.

[1074] The discouragement theory has been suggested to the author by the English legal historian Sir John Baker.

[1075] There were 18 *in personam* suits initiated in 1858, and 17 in 1859, according to the judicial statistics for these years. All others were *in rem* suits.

[1076] The 1860 Rules required such an action to be entered in the Cause Books, since destroyed, but Coote states that, following the 1854 enactment, entries were made in the Action Book even where no arrest was sought, so it is unlikely that other monitions were obtained without an entry being made in the extant Action Book. See Coote, *supra*, note 565, at page 132.

is monished, and no warrant for the arrest of any person is entered. However, the judicial statistics for 1859 state that 17 *in personam* suits were initiated that year.

These figures do not differ radically, but are difficult to reconcile. The fact that a lesser number of suits was calculated by Rothery for 1859 might be due to some never being served or otherwise abandoned, and not considered by Rothery to have been taken. But the five additional *in personam* suits in the judicial statistics for 1859, which do not appear in the Action Book for that year, might indicate that some suits were not entered, possibly due to there being no citation *in personam* issued.[1077]

Thus, by 1858 at the latest, there were no more *in personam* warrants of arrest issued in the High Court of Admiralty. But the gap in the Warrant Book series makes it impossible to determine whether this change came about in 1854 with the new legislation, or earlier in the century. Rothery is silent on the point. Dr. Lushington's comments in *The Clara* in 1855 to the effect that personal arrest would have become obsolete before 1780 cannot be contradicted, due to the gap in the records, and was doubtlessly related to the fact that the Warrant Books ended in the 1770s and thereafter the date of change cannot be determined. There can be no doubt that personal arrest was in full force at the end of the Warrant Book period, and the last entry, dated October 3, 1774 was a wage claim in which the claimant mariner, John Smith, obtained the arrest of the ship *Three Brothers*, but also of her master, Breehold Cleavland.

It is also clear that no decision or legislation appears to have put an end to personal arrest in admiralty. Browne, writing in 1802, places no restriction on personal arrest, although he mentions, in discussing contractual claims, that it had become rare. The 1832 Rules, intending to align vice-admiralty process with that of the High Court of Admiralty, set out that the vice-admiralty courts can arrest persons, although they recommend doing so only where another arrest is not feasible. Coote, writing in 1860, mentions the dictum of Lushington in *The Clara*, but states that nothing prevents personal arrest, at least in theory. But as has been seen, his second

[1077] This does not appear from the judicial statistics for 1859, where no mention is made of the number of citations actually *issued*, but from 1860 this information was collected and, each year between 1860 and 1875 there were less *in personam* citations issued than there were *in personam* suits initiated, indicating that the Action Book entries may have only been where *in personam* citations or *in rem* arrest warrants were issued. Over the 1860-75 period, there were 414 *in personam* suits commenced, but only 231 *in personam* citations issued.

edition in 1869 makes no further reference to personal arrest. Perhaps coincidentally, mesne process was all but abolished in 1869 as well.

In order to determine to what extent personal actions in the High Court of Admiralty had "withered away", Prichard and Yale refer to the seventeenth century common law precedents, and to Dr. Lushington's comment in *The Clara*.[1078] They find fault with Blackstone's remark to the effect that the arrest *in personam* of the defendant was frequently resorted to in initiating admiralty process in the mid-eighteenth century, considering it to be inconsistent with admiralty practice of his day.[1079] They look for confirmation of the diminishing quantity of *in personam* suits in the Warrant Books of the end of the seventeenth century and the commencement of the eighteenth, marking the beginning of the period under review in this enquiry.

In order to determine how many *in personam* suits were taken, Prichard and Yale tabulate warrants issued during the first six months of six sample years in the Warrant Books, arbitrarily chosing 1683, 1685, 1695, 1705, 1715 and 1725. The entire series of Warrant Books of the eighteenth century having been reviewed in this enquiry, it is possible to confirm that the number of *in personam* claims they tabulate for the first half of the last three sample years corresponds to the results found.

It is however to be noted, that Prichard and Yale only consider a suit to be *in personam* if a person or persons are the *sole* defendant parties. All other suits are tabulated as *in rem*. However, they may have overlooked a third category, where suit is taken and warrants issued against a ship and a person, such as her master or owner. These suits are mixed in the sense of being *in rem* and *in personam*. They involve the arrest of property and of persons and, in the latter sense, are no less *in personam* than suits filed solely against persons.

Taking that part of the table of Prichard and Yale covering sample years from the eighteenth century, and continuing it for the remaining decades for which there are Warrant Books, allows one to identify the importance of mixed admiralty suits. In a mixed suit, the entry in the Warrant Book is double. It starts with the usual wording requesting the issuance of a warrant to arrest the

[1078] *Hale and Fleetwood*, *supra*, note 41, at page cxxxv.
[1079] *Ibid*. See William Blackstone, *Commentaries on the Laws of England* (London: Clarendon Press, 1765), vol. III, at page 108. Blackstone makes a general reference to Clerke's *Praxis Admiralitatis*, *supra*, note 305, section 13.

vessel, her apparel and furniture, and to cite the master and all persons in general having any right, title or interest in the vessel. But it includes a second entry line, requesting moreover the arrest of the master, or owner, as the case may be.

In Table 2, the years chosen include ten-year samples from 1744 to 1774 instead of mid-decade, as Prichard and Yale had done, due to the fact that the Warrant Book for 1745 is missing, and that the Warrant Books end in the fall of 1774. Substituting 1744, 1754 and 1764 allows the table to continue the sampling through to 1774 and the end of the Warrant Book series.

Table 2: Arrest Warrants issued in London during the first half of:

Year	*In rem*	Mixed	*In Personam*	Total
1705	55	10	15	80
1715	34	11	11	56
1725	46	8	7	61
1735	46	30	6	82
1744	25	47	8	80
1754	17	26	18	61
1764	16	24	3	43
1774	17	27	6	50
Average	32	23	9	64
	50%	36%	14%	100%

As can be seen from Table 2, whereas *in personam* suits to 1725 appeared to Prichard and Yale to be diminishing, in fact they continue to be important, with the first half of 1754 exceeding all previous comparable figures for the sampled decades of the century. Of more importance is the number of mixed suits, involving the *in personam* arrest of the master or owner. These suits become the most numerous as of the mid-eighteenth century, exceeding, in three of the last four decades sampled, the total of purely *in rem* and *in personam* suits.

The records of the High Court of Admiralty for the eighteenth century cannot thus be said to demonstrate the demise of *in personam* process, notwithstanding the arguments of the serjeants-at-law in the reported common law court cases. Rather, the decades sampled in Table 2 demonstrate the number of *in personam* suits to be equal to the number of purely *in rem* suits, when one combines purely *in personam* suits with the mixed *in rem* and *in personam* suits.

Table 1, taking the records of the eighteenth century and of 1858-59 as a whole, revealed that 56% of all arrest warrants were either solely *in personam* or *in personam* and *in rem*. And this, notwithstanding the fact that none of the 638 suits entered in the Action Book for 1858-59 resulted in *in personam* arrest. As seen above, substituting Rothery's report to Parliament for 1841-59, in place of the Action Book of 1858-59, would reduce the percentage to a little more than 37%, even if all of Rothery's causes are assumed to solely involve *in rem* arrests.

This tendency can be validated for the nineteenth century by a review of the records of the Quebec Vice-Admiralty Court, a period during which there are no extant Warrant Books, Action Books or judicial statistics in England. The perusal, not only the Action Books of the Quebec court, but of the entire archive of the files of the court, brings into focus a clear image of arrest process as it existed in what was throughout the century the most active British instance admiralty court outside of London.

Personal Arrest in Quebec

The extant records of the Quebec Vice-Admiralty Court include 3064 files. Action Books, modeled on English Warrant Books, were introduced by the 1832 Rules. Entries in the Action Books were numbered, starting with the number 1 each calendar year and, although the first Action Book, covering suits entered between 1832 and 1838, has not survived, the practice in the Quebec registry was to write the Action Book entry number on the backsheet of one of the principal pleadings of each file, thereby allowing for the correlation of files to Action Book entries for the missing volume.

The second Action Book, covering 1839 to 1842 and the third, covering 1843 to 1848, have survived. There were almost doubtlessly subsequent Action Books lost in the courthouse fire in 1873. The fire also probably consumed the Quebec Vice-Admiralty Court files from 1844 to the time of the fire. The earlier files have survived, probably due to their being stored off site. The extant files resume in the mid-1870s and continue until the creation in 1891 of the Exchequer Court as Canada's colonial court of admiralty, but no Action Books seem to have been continued following the fire, very probably because suits were no longer initiated through arrest during the post-1873 period.

The Quebec files do not suffer from the identification of suit problem related to the "civil and maritime" language describing the cause of action in the English Warrant Book or Action Book entries, precisely because a review of the full files confirms that, before the Quebec Vice-Admiralty Court, this reference as an entry in the Action Books was restricted to suits in damages due to some violence or act of ill-treatment on board vessels, usually by masters or mates.

Of the more than 3,000 instance suits filed in Quebec during the period under review, the arrest of the subject ship occurs in somewhat less than 2,000 suits, the arrest of the subject cargo in more than 100 suits and that of freight in less than 10 suits, perhaps reflecting the fact that freight was often paid in the United Kingdom and thus not easily accessible in Quebec. This leaves more than 1,000 suits where neither ship nor cargo nor freight was arrested.

As in the High Court of Admiralty, the remaining suits resulted in the arrest of persons. Setting aside the approximately 400 suits in damages for assault and battery, for which personal arrest was the sole remedy, still leaves close to 1,000 suits where a person is arrested in *in personam* or mixed *in rem* and *in personam* process in admiralty suits in Quebec not involving ill-treatment. In all, personal arrest was resorted to in more than 1,300 suits, including 1,173 arrests of the master and 110 of a mate. In 38 suits the vessel owner was arrested.[1080]

These figures include assault claims, but clearly, as in the United Kingdom, a large number of suits involved the arrest of persons over the entire spectrum of the jurisdiction of the vice-admiralty. Table 3 illustrates the overall numbers of Quebec vice-admiralty warrants and the percentage each represents.

Table 3: Arrest Warrants issued in the Quebec Vice-Admiralty Court 1764-1848:

In rem	Mixed	*In personam*	Total
1,724	191	1,149	3,064
56%	6%	38%	100%

Personal arrest was not an option for every claim. If *in personam* arrest had not been available in suits for necessaries in England, it may be at least partly due to the English rule that a ship could

[1080] As in the United Kingdom, these were the main categories of person arrested, but others included charterers, merchants, pilots, passengers, stewards and even the wives of masters or mariners.

not be arrested for necessaries in its home port. The logic was that the shipowner maintained a local presence, and security should not be necessary. As the necessaries supplier was presumed to be looking to the ship as his security, arresting the master or owner would be contradictory, and no English proctor appears to have attempted to avoid the home port rule by arresting the owner or master alone. The home port rule was extended to vice-admiralty courts by the *Vice-Admiralty Courts Act, 1863*,[1081] but may have been of little effect in Quebec, or indeed probably anywhere outside of London, as the colonial shipping business, fuelled by the Navigation Acts, was a business promoting British-owned ships.

Of the approximately 50 suits for necessaries before the Quebec vice-admiralty during the period under review, only two involve personal arrest. In *The William Pitt*,[1082] the claimant stevedore, Robert Dewar, provided his services to load the vessel in exchange for the promise of her master, Thomas Willdrige, to provide Dewar with free passage from Quebec to Liverpool. The claimant loaded the vessel during 11 days, before being injured in a fall on board. He continued to work as cook on board for the final three days of loading, but was then put on shore by the master as being unable to work during the crossing.

Dewar filed suit in admiralty, obtaining the arrest of the master personally, but does not appear to have sought the arrest of the ship. The record indicates that the suit was settled, but does not indicate whether settlement was in the form of passage to Liverpool or financial compensation. In *The Milton*,[1083] the claimant Quebec carpenters Augustin Labbé and Michel Désoria had provided repairs to the vessel and, not being paid, filed suit obtaining the arrest of the *Milton* and of her master, John Duff.

All other suits in Quebec for necessaries provided to ships involved ships registered in England or elsewhere and resulted in the arrest of the ship alone. It is interesting to note that there are as many suits for necessaries in the Quebec records as there are in the extant High Court of Admiralty records, illustrating the rigours of Atlantic crossings, but also illustrating that suits *in rem* for necessaries provided in London could only be taken against ships that were not locally owned.

[1081] *Vice-Admiralty Courts Act, 1863* (U.K.), 26 & 27 Vict., c. 24, s. 10.
[1082] *The William Pitt*, QVA 764-33 (1833 QCVA).
[1083] *The Milton*, QVA W[16]-44 (1844 QCVA).

As in England, suits on bills of lading were taken *in rem* only in Quebec, with the exception of one suit. In *The Martin*,[1084] the claimant merchant, Henry Black, alleges that the master of the *Martin*, Christopher Bell, arrived in Quebec with ten cases of merchandise consigned to the claimant, erroneously described on the bills as Mathew Black. The master released eight of the ten cases to the claimant, but apparently refused to release the last two cases and was preparing to return to England. The claimant took suit against the master personally, and not against the ship, and obtained the master's arrest.

The master, pleading in French through his proctor, George Vanfelson, a seasoned admiralty practitioner in Quebec, alleged that the two cases had indeed been delivered along with the rest. The master was arrested on August 30, 1809 and taken to jail. Vanfelson first pleaded a lack of jurisdiction, but then filed the plea of having delivered the merchandise to the claimant. His motion to allow the master to be released awaiting the outcome was dismissed, but the court finally allowed the master to return to his ship on September 9, 1809, as the suit continued its course. The record does not reveal the outcome, but the *Martin* remained in Quebec during the hearing, although not under arrest.

Suits in the Quebec vice-admiralty taken on bottomry or respondentia bonds were also taken solely *in rem* against the ship or cargo they were to secure, much as was the case in London. Again, the logic was that the claimant had looked solely to the ship or cargo as security, and not to the master or owner.

The same can be said of suits for salvage. These suits were taken *in rem* against the ship or cargo salved, or against the proceeds of their sale. There are 66 salvage suits in the Quebec vice-admiralty records during the period under review, again an impressive number when compared to the 173 salvage suits entered in the Warrant Books and Action Book of the High Court of Admiralty. However, Rothery's report to Parliament for the years 1841 to 1866 illustrates the rapid increase in salvage suits, and in collision suits, resulting, at least in part, from the advent of steam navigation. Sailing ships could only come to the aid of others if winds were favourable. But steamships facilitated salvage, and collisions. Rothery tabulates no less than 2,673 salvage

[1084] *The Martin*, QVA 25-09 (1809 QCVA).

suits and 3,508 suits for collision damages, constituting together more than ⅔ of all suits taken.[1085]

Only one Quebec salvage suit resulted in a personal arrest. In *The Elizabeth*,[1086] Walter Shields, the claimant second mate of the salving ship *Mary*, sues William Johnston, the master of the *Mary*, alleging that the goods salved by the claimant from the *Elizabeth* had been sold by Johnston, who refused to give Shields his portion of the proceeds. The fate of the *Elizabeth* is not revealed, but although the proceeds of sale are in the master's possession, the claimant obtains the personal arrest of Johnston, and does not appear to seek the arrest of the proceeds.

However, as in England, virtually all other suits in the Quebec vice-admiralty could lead to the arrest of the subject ship or property, or of the master and, in certain cases, the owner of the subject property. There were many dozen instances where the master was arrested in a wage suit without any personal act of the master even being alleged, other than his refusal to pay wages to the claimant. The master might have owned a portion of the ship but, with or without an equity interest in the vessel, the master was always a representative of the owners. In many wage suits, both ship and master were arrested. And in Quebec, it became common in wage claims to arrest the master alone. This practice increased during the 1800s, notwithstanding the provision in the 1832 Rules limiting the arrest of persons to cases where such arrest was necessary. It might have been necessary to arrest a master in a suit in damages for his personal assault, but where the wage claimant alleges having been let go, without any reference to ill-treatment, the ship would seem to be a more logical target than the master or owner.

Where both ship and master were arrested, the marshal would attend on board with the two warrants, but had the discretion to serve the master personally, requesting bail, without taking him into immediate custody. The arrest of the vessel would be incentive to leave the master on board to arrange bail. At any rate, where the ship was arrested, the master would not be able to sail and would be confined to the harbour. But the arrest of the master alone, on the sole allegation of breach of the ship's articles, would require him to be taken into custody as, otherwise, the ship could simply sail away.

[1085] See *supra*, note 631.
[1086] *The Elizabeth*, QVA 1001-35 (1835 QCVA).

The mixed arrest of property and of persons was common in Quebec, much as in England, throughout the period under review, and approximately 100 suits have been identified where both ship and master were arrested. As the decades wore on, the arrest of the master in purely *in personam* suits became even more popular in Quebec. Continuing the tabulation of warrants issued in Quebec during the first six months of sample years, as was done in Table 2 for the High Court of Admiralty, yields the following results.

Table 4: Arrest Warrants issued in Quebec during the first half of:

Year	*In rem*	Mixed	*In personam*	Total
1814	15	2	1	18
1824	15	0	1	16
1834	36	0	11	47
1844	7	0	56	63
Average	18	1	17	36
	50%	3%	47%	100%

Table 4 demonstrates that, as in London,[1087] the arrest of masters or owners in Quebec once again represents one half of all sampled arrests when *in personam* and mixed *in rem* and *in personam* suits are combined. And the *in personam* arrest of the master alone overtakes all other arrests as the mid-nineteenth century approaches. Prior to the 1832 Rules, the *in personam* arrest of the master or owner was mostly restricted to claims involving contempt or violent acts on board vessel. Although there are in the Quebec records several earlier examples of mixed arrests in suits involving no personal act of the master or owner, in collision[1088] and wage suits,[1089] their

[1087] Rothery's report tabulates suits in London from 1841 to 1866. See *supra*, note 631. However, only one year corresponds to the years canvassed in Table 4. The entire year 1844 saw 338 suits initiated in Quebec, but only 188 in London. This illustrates the importance of the Quebec vice-admiralty. Taking 1841 to 1848, from the first year canvassed by Rothery to the last year for which there are records for the Quebec court during the period under review, yields a total of more than 1,500 suits filed in Quebec as compared to 1,900 in London.

[1088] See for example *The Charles*, QVA M-66 (1766 QCVA).

[1089] See for example *The Sanderson*, QVA Q^2-10 (1810 QCVA), *The Queen*, QVA 145-15 (1815 QCVA), *The Streatlam Castle*, QVA 227-19 (1819 QCVA), *The Minerva*, QVA OO-19 (1819 QCVA), The Prince, QVA 258-21 (1821 QCVA), *The Peggy*, QVA 275-22 (1822 QCVA), *The Grecian*, QVA 462-27 (1827 QCVA) and *The Joseph Anerson*, QVA 553-29 (1829 QCVA), all wage suits without reference to personal acts or fault of the master, but where the master was arrested along with the ship.

prevalence is not as important as was the case in England in the eighteenth century, illustrated in Table 2.[1090]

However, in Quebec, the arrest of the master in disputes not involving contempt or violence takes a much different course, becoming prevalent in the years following the adoption of the 1832 Rules. There had been in Quebec a number of wage disputes, prior to the new rules, where the master was arrested, but not the vessel, even in absence of any allegation of a personal act of the master.[1091] But from 1832, the pattern increases, with the arrest of the master in wage suits becoming more and more popular, with or without the arrest of the ship. By 1840, the arrest of the master alone in wage suits surpasses cases of mixed arrest and, by 1844, it becomes the most popular remedy in the Quebec Vice-Admiralty Court, as seen in Table 4. The trend continues up until the end of the Quebec records in 1848, the rest being lost in the 1873 fire.

Table 3 shows that, in all extant records over the period under review, masters, owners and mates were arrested *in personam* in 44% of the 3,064 suits filed in the Quebec Vice-Admiralty Court. By comparison, in the High Court of Admiralty Warrant Books, Table 1 indicates that no less than 56% of suits filed involved the arrest of masters, owners or mates. As previously noted, there were 1,173 masters arrested in Quebec and 5,212 in London. And if one sets to one side the suits tabulated by Rothery, including the 638 suits initiated in the final English Action Book for 1858-59 containing no personal arrests, the percentage of masters, owners and mates arrested rises to 59%. These numbers include assault and contempt cases for both courts.

In Quebec, assault suits numbered 400 and, in London, assuming every "civil and maritime" suit to be one for assault, there were probably more than 1,000. But even eliminating these suits and the arrests they entail, still leaves masters, owners or mates being arrested in 34% of all other suits in Quebec and in 49% of all other suits in England.[1092]

[1090] See Table 2 above. In the sampled years, mixed suit arrests in London represent more than ⅓ of all arrests.

[1091] See for example, *The Tasso*, QVA 204-19 (1819 QCVA), *The Vigilant*, QVA 220-19 (1819 QCVA), *The Waltar*, QVA QQ-19 (1819 QCVA), *The Industry*, QVA 245-20 (1820 QCVA), *The Europe*, QVA 251-20 (1820 QCVA), *The Jack Tar*, QVA 256-21 (1821 QCVA), *The Ranger*, QVA 288-22 (1822 QCVA), *The Friends*, QVA 290-22 (1822 QCVA), *The William of Whitehaven*, QVA 434-26 (1826 QCVA), *The Sisters*, QVA 569-29 (1829 QCVA), and *The Cyrus*, QVA 657-31 (1831 QCVA), all wage suits where the master is arrested alone, even in absence of any allegation of personal fault.

[1092] The relatively smaller drop in percentages in England is due to the proportionately smaller number of suits in damages for assault in London, possible due to the absence of interest noted above for a British mariner

The similarity of overall percentages of personal arrest in Tables 1 and 3 illustrates that the practice existed throughout the period under review. The High Court of Admiralty records reviewed include a large gap between 1774 and 1858. The Quebec records fill most of this period starting in 1764 and ending in 1848. As has been noted, the practice of personal arrest in England waned sometime during this gap, and was not observed in any of the 638 entries in the final Action Book, covering suits entered in the High Court of Admiralty between October 1858 and December 1859. That period was obviously a vigorous one but, since 1854 at least, suits in admiralty no longer required arrest and, even though the practice was still followed for *in rem* suits, personal arrests had completely disappeared.[1093]

Dr. Lushington suggests in *The Clara* that personal arrests disappeared sometime before 1780. This cannot be easily verified for England, but indications are that the disappearance of personal arrest was more gradual, and indeed was still popular in the vice-admiralty instance courts throughout the period under review. Even in Britain, civilian writers such as Browne in 1802,[1094] the commentators on the draft 1832 Rules[1095] and Coote in 1860[1096] all believed that personal arrest was still available, if to be used sparingly.

If *in personam* suits, in the modern sense without arrest, could be taken in admiralty from 1854 in England, does this mean that personal arrest in earlier suits was not an *in personam* remedy? The question merits reflection, as the terms *in rem* and *in personam* were only commonly used from Browne's time, coinciding with the commencement of reporting of admiralty cases.

returning home to sue for assault after having been discharged. However, as demonstated above, the figure would change if Rothery's tabulation were to be included.

1093 The final Action Book in the High Court of Admiralty was designed for the obtaining of an arrest, even though arrest had no longer been required since 1854. There are 14 suits entered in the Action Book for 1858-59 where no arrest was sought, but only the issuance of a monition. The fact that only 14 *in personam* suits appear in that record demonstrates the continued popularity of the practice of arresting *in rem*. And although the reports to Parliament in 1833, and by Rothery in 1867, do not differentiate between suits *in rem* and *in personam*, the judicial statistics between 1858 and the merger of the courts in 1875 confirm the prevalence of *in rem* suits. See *supra*, note 1031.

1094 Browne, *supra* note 195 outlines *in personam* suits at page 432 of volume II thus: "A warrant goes in the name of the King, directed to the marshal and his deputy, empowering and charging him to arrest, or cause to be arrested, the *person*, and him so arrested to keep under safe and secure custody, so that he be forthcoming before the court to answer in a maritime cause."

1095 See *supra*, note 1011.

1096 Coote, *supra*, note 565, describes *in personam* suits at page 131 as allowing the plaintiff to "take out a warrant, and arrest the body of the owner or master of the vessel against whom the claim is." Coote states that this remedy is available in wage suits, as well as in damage and salvage suits and virtually in all suits where the admiralty court has jurisdiction. In some suits, such as in damages for assault, "the plaintiff will of course have no alternative but to do so."

Browne uses the term *in personam* to describe cases where personal arrest is allowed, and provides no explanation as to whether persons can be made defendants without arrest. However, an owner could appear voluntarily for the ship in which case any judgment against him would be *in personam*, and Coote states that the claimant has an option in every case where an *in rem* suit is available, but that an *in rem* action is to be preferred unless the *res* is inaccessible to arrest. Voluntary appearance by an owner was always a possibility, but was not contemplated by the initial suit, which had to be commenced by arresting something or someone.

If the nineteenth century authors considered personal arrest as *in personam* process, there is no reason to disagree. Certainly the arrest was against a person and not a *res*. However, the lack of differentiation in the previous centuries has doubtlessly led the common law to presume that the admiralty courts had no *in personam* jurisdiction. A better explanation of the situation might be that admiralty process had always been initiated by arrest, and was no different where arrest was of property or of persons.

As has previously been noted, Coote's second edition of admiralty practice, published in 1869, no longer refers to personal arrest as an option. It can be safely advanced that personal arrest had disappeared in England by the end of the period under review. And since Quebec admiralty records for the last two decades of the period under review were lost by fire, one can only take note of the fact that, perhaps unlike in Britain, arrest of persons and property was equally available in Quebec to the end of the records in 1848. The very last suit in the extant Action Books, *The Jean Ann*,[1097] was a suit for wages, wherein the claimant mariner, Thomas Peake, arrested only Louis Mercier, the ship's master, but did not seek to arrest the ship.

Although beyond the scope of the period under review, when the Quebec Vice-Admiralty Court files resume in the mid-1870s, there are no further Action Books, and arrest was no longer a prerequisite to initiating a claim, but rather a simple option. By the time of the enactment of the *Vice-Admiralty Courts Act, 1863* and of the *Vice-Admiralty Courts Act Amendment Act, 1867*, *in rem* process against the wrongdoing *res* had become the mainstay of admiralty jurisdiction, much as it remains to this day, and *in personam* suits were issued much as they had been in England

[1097] *The Jean Ann*, QVA T[28]-48 (1848 QCVA),

since the 1854 legislation. Personal arrest had withered on the vine in both countries, even though never formally abolished.

Section 14 of the *Vice-Admiralty Courts Act, 1863*[1098] allowed Her Majesty to establish rules of vice-admiralty practice, and a schedule to the Act included the Quebec court as being subject to such rules. The 1863 Act was amended in 1867[1099] allowing, amongst other changes, barristers and solicitors in the colonies to practice alongside advocates and proctors, much as in England since 1858. These Acts sought to bring the vice-admiralty courts up to date with the admiralty practice in England, as had the 1832 Act.

Following the merger of the High Court of Admiralty with the other royal English courts in 1875, the practice of the English admiralty was in turn aligned with that of the common law courts. The adoption in August of 1883 of the final set of rules of practice for vice-admiralty courts was made pursuant to the 1863 enactment, but the procedural changes, including the commencing of each action by the issuance of a common law style writ of summons, was greatly influenced by the changes in English admiralty practice following the merger.

These rules, like admiralty rules in England and Canada today, referred to *in rem* and *in personam* process in the modern understanding, and personal arrest was no longer available. But this obsolescence had gradually come about in the vice-admiralty courts by the end of the period under review, much as it had done in the High Court of Admiralty long prior to the 1875 merger. The arrest of persons before judgment had become no more palatable in admiralty than mesne process had become at common law, a remedy that had all but disappeared by the end of the period under review.[1100] From then on, in England as in Quebec, the truly distinct aspect of admiralty procedure was now limited to actions against inanimate objects, that were ships, cargoes and freight.

But the decision of Sir Francis Jeune in *The Dictator*, finding that *in rem* process was the means of compelling the *in personam* defendant to appear, goes against the evidence contained in the records reviewed in this enquiry. The claimant in England and in Quebec clearly had an option,

[1098] *Vice-Admiralty Courts Act, 1863* (U.K.), 26 & 27 Vict., c.24.
[1099] *Vice-Admiralty Courts Act Amendment Act, 1867* (U.K.), 30 & 31 Vict., c. 45.
[1100] Pursuant to the *Debtors' Act*, 1869 (U.K.), 32 & 33 Vict., c. 62. See *supra*, note 420.

even in absence of any allegation of the master's personal implication in the dispute. Jeune based his findings on the paucity of information at his disposal, consisting mainly of the treatises of Clerke and of Browne, and of the utterances of common lawyers in their explanations of what they thought the admiralty courts should have been.

Had Jeune reviewed the court records in England or in Quebec, he would have been faced with the reality of *in personam* suits being taken in England, at the very least throughout the eighteenth century and, in Quebec, well into the nineteenth. This period was well beyond the principal seventeenth century prohibition era, and, of the 7,690 purely *in personam* and mixed *in rem* and *in personam* suits issued during the period under review in England and in Quebec, as tabulated in Tables 1 and 3 above, probably not more than a few dozen were ever the object of common law court intervention. Even in the 6,708 purely *in rem* suits commenced in both courts, numerous voluntary personal appearances by owners would have further extended the reach of *in personam* process in admiralty.

It may never have been possible to state with any certitude that the admiralty courts had no *in personam* jurisdiction at any time during their long history, but the results of the present enquiry clearly contradict the common law courts and their lawyers. It would rather appear that claimants in admiralty had both *in rem* and *in personam* tools in their toolboxes throughout the existence of the admiralty courts, even if, in England, the use of the *in personam* tool had waned by the end of the eighteenth century. Its vigourous use in Quebec, and the reference in the 1832 Rules to personal arrest as a legitimate tool, if to be used sparingly, confirm its existence in all admiralty courts of British origin.

The Prevailing Theory

This lends some credence to the American personification theory of *in rem* process, but it may not be possible to conclude that a shipowner should only be liable up to the value of the arrested property. First, the shipowner who attorns voluntarily to the jurisdiction of the admiralty courts on an *in rem* claim becomes a party to the action. Should he not thus be liable to any judgment that may follow? Secondly, should not the defendant who is made an *in personam* party to the initial claim, with or without personal arrest, be as liable as he would have been without an *in rem* arrest? The problem the English common law courts faced, and that Jeune himself faced, is

that the popular theory was that the admiralty courts had no such personal jurisdiction, but only jurisdiction over the *res*.

But, as illustrated herein, this theory rests on a foundation that is not sound. The admiralty courts had had personal jurisdiction ever since Clerke's time and undoubtedly since the middle ages. If that jurisdiction fell into abeyance in England at the end of the eighteenth century, it continued in Quebec until the end of the period under review. The admiralty courts enjoyed a vigorous jurisdiction *in personam* and exercised it in thousands of instances, more than one half of all admiralty suits. Once that is determined, there remains no need to decide whether that jurisdiction was limited by the additional exercise of *in rem* jurisdiction against a ship or other property. The personal defendant was not simply before the court as owner of the *res*, but was personally subject to arrest and condemnation by the decree of the court.

It is submitted however, that although Jeune may not have fully understood the prior admiralty process, he arrived at the right conclusion. There is no need to worry about the limit of the value of the *res* when the appearing *in personam* defendant can be found liable in his own right, regardless of the value of the *res*. The concept of personal liability is now too well integrated into admiralty law, in England and in Canada, to try to substitute the American personification theory in the stead of the procedural theory, but the effort is, at any rate, unnecessary. The rule set down by *The Dictator* stands, at least in England and Canada, due to the long years since it was first elucidated. But also because it fits the admiralty regime that existed for centuries, whether Jeune was aware of it or not.

Admiralty *in rem* and *in personam* Vocabulary

As has been seen, the vocabulary of admiralty process has baffled writers throughout the nineteenth and twentieth centuries. Marsden's review of the records of the sixteenth century confirmed the options decribed by Clerke. But Clerke made no mention of the terms *in rem* and *in personam*, even though these terms were so well known to the students of Roman law. Prichard and Yale were intrigued to find no use made of the terms prior to Browne's treatise, written at the beginning of the nineteenth century.

It would only be following the 1854 legislative changes that *in personam* process would be separated from arrest in England and in 1860 that the new rules of the High Court of Admiralty would specifically refer to *in rem* and *in personam* process. The vice-admiralty legislative changes in 1863 and 1867, and the final vice-admiralty rules in 1884 would extend this new terminology to the colonies, including Quebec, where Confederation had left admiralty business subject to English legislation.

But from this enquiry it can be seen that, the common lawyers notwithstanding, throughout the period under review claimants in London and in Quebec had the option of proceeding *in rem* against the ship or property that was the subject of their suit, or *in personam* against the master or owner who was in charge of that property. It was not necessary to allege any personal fault or act of the *in personam* defendant, and arrest was available against him in the same manner as against the *res*.

It is the submission of this enquiry, that the availability of arrest is precisely the key to understanding admiralty process prior to the nineteenth century reforms that came into force at the end of the period under review. Arrest of property and of persons was available in England, at least until the end of the extant Warrant Books in 1774, and in Quebec, at least until the end of the extant Action Books in 1848. The arrest of ships or other property and the arrest of persons was executed in exactly the same manner, and the goal was exactly the same in each. Arrest in order to obtain security for the eventual decree to be rendered. The goal of *in rem* process in admiralty today remains precisely the same.

It is also to be recalled that, throughout the period under review, personal arrest in view of obtaining security was also available in the common law courts. Mesne process was progressively losing its social acceptance and would be virtually ended by legislation in 1869. In admiralty, there never was such legislation, as the civilians had already abandoned their right to arrest persons, at least in England, before the legislative changes. The precise date of this change is between 1774 and 1854, but it is not possible to situate it exactly in this 80 year spread, as the change was never crystallized by legislation or judicial decision. In Quebec, it continued much later than in England, but was similarly abandoned without legislative fiat as personal arrest became less and less popular.

But it cannot be doubted that the common lawyers, who thought *in personam* process to be beyond the ken of the admiralty, should have looked more closely at the Warrant Books. Regardless of the exact breakdown in numbers or percentages of *in rem* and *in personam* arrests, it is obvious, throughout the period under review, that both types of arrest were popular in England and in Quebec, and went well beyond the arrest of persons accused of violence or contempt. If anything, as the nineteenth century wore on, the arrest of masters became more popular in Quebec admiralty practice than the arrest of property.

Why then did the civilians, learned as they were in the civil law, not make use of the terms *in rem* and *in personam* before this period? The answer it is submitted is as simple as the statement of Clerke. It is because both were in fact the same process, akin to the process today referred to as *in rem*. In fact there were no distinguishing characteristics of *in rem* or *in personam* process, but rather the sole process of arrest, which is in essence the *in rem* process still in use. It is for this reason that no author prior to Browne saw the need to use either term.

Process *in rem* in admiralty was available against property or persons. Clerke stated as much. He pointed out that the property to be arrested could be any property of the defendant and there is no reason to doubt this, considering that Marsden's review of the records of the sixteenth century confirm as much. The arrest of any property would morph into the arrest of the subject property during the seventeenth century, but the arrest of the personal defendant in Clerke's time could only be that of the defendant owner or master of the property that was the subject of the action. And *in personam* process would remain unchanged from Clerke's day virtually until the conclusion of the period under review.

Marsden and Prichard and Yale all looked at the process using their twentieth century glasses. They saw no reason to doubt the views of Clerke, Browne and Jeune, but they doubted those of Blackstone. In fact, a closer review of the Warrant Books and Action Books allows the modern reader to confirm what all of these authors put forward. That review leads to the conclusion that there never was a dividing line between admiralty suits *in rem* and *in personam*. The goal of obtaining security was the same, as was the process. Only the subject of the arrest varied. From any property, it became the subject property. But on the personal side, it remained the master or

owner of the property that was the cause of the action. Prior to the closing years of the period under review, there was no need to differentiate between persons and things.

CONCLUSIONS:
THE ORIGIN AND DEVELOPMENT OF *IN REM* PROCESS

As demonstrated by this enquiry, admiralty procedure was in flux during the period under review. By 1700, as the period begins with the establishment of admiralty courts in the new world, the English High Court of Admiralty had just survived the worst decades of its existence. It had been under attack since the middle of the sixteenth century when prohibitions from the Westminster courts first became common. The settlement of the judges in 1575 appeared promising, but was quickly forgotten, and Coke even denied it had ever been agreed. The Act Book for that year, where the settlement was doubtlessly copied, had somehow conveniently disappeared. Coke was known for making wild deductions,[1101] but his influence was to be long-lasting. Notwithstanding the valiant efforts of the civilians, the battle between the common lawyers and the civilians would not end favourably for the latter.

The second agreement of 1633 was forgotten as quickly as the first, and the timid Interregnum legislation in favour of the admiralty court was not renewed following the Restoration. Abandoning conciliar efforts, the civilians turned to Parliament. But the bills proposed up to the accession of James at the end of the seventeenth century failed to get the traction needed to be adopted. As the period under review begins, the tide was out, and admiralty jurisdiction was at an all-time low. The High Court of Admiralty could still boast a solid turnover, but the majority of the instance court's caseload was occupied by simple wage disputes.

The British vice-admiralty courts in New England, like the French admiralty courts in New France, would re-establish some of the jurisdiction, especially given the relative importance of shipping and maritime law to the new colonies. In fact, these colonial courts, especially the British ones, were to enjoy a jurisdiction more extensive than that of the courts back home. The Quebec Vice-Admiralty Court would only come into existence in 1764, but with the loss of the vice-admiralty courts in New England following the American Revolution, would quickly become the most important admiralty instance court in the British empire outside of England. Just as the French admiralty court in Quebec had been the most active outside of France.

[1101] The term is used by Sir John Baker in describing Coke's assertions with regard to legal education. See Sir John Baker, *The Inns of Chancery 1340-1640* (London: Selden Society Supplementary Series, vol. 19, 2017), at page 47.

It is for this reason that the unique history of the admiralty courts of Quebec City is of such importance, and why the review of the records of the Quebec admiralty court of the French regime and those of the Quebec Vice-Admiralty Court, along with the comparable records of the High Court of Admiralty, assists in replying, at least in part, to the queries raised by this enquiry.

But the opacity of the civilian courts in England and in Quebec only serves to conceal many of the aspects of admiralty procedure. The admiralty courts in France and in New France could boast the Ordonnance of 1681, a genuine code of maritime law and admiralty procedure. The French legislator dreams to this day of reproducing this bible of maritime law, and a recent promise to adopt a modern *Code de la mer* was applauded by maritime practitioners and academics in France, but quietly forgotten by the French government. Proposing such game-changing ordonnances to Louis XIV required someone of immense clout, and Colbert was just the man. His Ordonnance of 1667 on civil procedure, his Ordonnance of 1673 on commerce and his Ordonnance of 1681 on the marine applied in Quebec, as did the Custom of Paris, codified only a few years before the arrival of Jacques Cartier. They were welcome and timely guides to a maritime colony like New France, where judicial tradition was in its adolescence, if not in its infancy.

The French established a system of maritime law that was organized and coherent. There was no battle over jurisdiction, and the French admiralty courts in Quebec developed maritime law in an unfettered fashion during 60 years of existence. The fact that there was no French tradition of rendering or reporting reasons for judicial decisions, and the difficulties of deciphering the registers that remain, should not be interpreted as an absence of a coherent system of maritime law. The French admiralty court in Quebec fit in seamlessly with the Prévôté, to such an extent that the admiralty lieutenants and the judges of the Prévôté often replaced one another, and their decisions were sometimes mixed together in the admiralty registers of hearings, and the same is probably true of the registers of the Prévôté.

British admiralty law was another matter. Contrary to established logic, maritime law was not the *chasse gardée* of British admiralty courts and, to this day, maritime law and admiralty law are not synonomous terms in England. The battles of the sixteenth, and especially of the seventeenth century, divided maritime law between the common law courts and the admiralty court along

territorial lines, depending on whether the maritime event had taken place on land or at sea. British admiralty law is still restricted to the law over which the court of admiralty has jurisdiction. Subjects such as marine insurance long ago were, but no longer are, part of British admiralty law. But for present purposes, it is clear that admiralty procedure, and especially *in rem* process, have always been the exclusive tool of the admiralty courts, and non-admiralty maritime law claims in England, to this day, do not benefit from this remedy. The 1999 Arrest Convention, while only timidly referring for the first time to claims for insurance premiums, without allowing arrest for any other insurance-related claim, still goes too far to be ratified by the United Kingdom.

Canada has gone one step further, by extending the admiralty jurisdiction of the Federal Court and *in rem* process to any maritime claim over which the federal Parliament has jurisdiction. The definition of Canadian maritime law is sufficiently wide to include any law previously falling under British admiralty law. But while the definition goes further, to include all maritime law that would have been entertained by those courts had they had jurisdiction over all maritime heads of jurisdiction assigned to Canada's Parliament, the Supreme Court has determined that there must be an actual law of Canada to support any additional head of claim.[1102] The Federal Court is a statutory court in that sense, and can only go beyond traditional British admiralty business when expressly empowered to do so by statute.

There thus never was, and probably never will be, a maritime code in England or in Canada to serve as an all-encompassing Ordonnance de la Marine.[1103] This lack of a structured system has given rise to over half a millennium of conjecture and invention as to the exact nature of admiralty procedure. Prior to Coke's day, there had been very little said about admiralty procedure, the one book on the subject being a posthumous printing of Clerke's notes. It is anything but clear on the exact relationship of arrest of the person and that of the person's assets. Were assets only arrested where the personal defendant truly absconded? Or were they arrested immediately, on the fiction that he had done so?

[1102] See, for example, *ITO v. Miida Electronics*, [1986] 1 S.C.R. 752, at page 766.

[1103] A *Maritime Code* was enacted in Canada in the 1970s, S.C. 1977-78, c. 41, but was never proclaimed in force, and was repealed by the somewhat less ambitious *Canada Shipping Act, 2001*, S.C. 2001, c. 26, s. 333.

One can be reasonably certain from Marsden's work that, where assets were arrested in the sixteenth century, arrest was not limited to the subject of the action. But to say anything beyond that would require a great deal of additional research in the Warrant Books of the High Court of Admiralty from the seventeenth century. And no one has seen fit to attempt to undertake such an endeavour.

So one is left with common law statements, including reported remarks of serjeants-at-law on admiralty arrest, the terms of the 1633 settlement, the legislation of the Interregnum and the arguments of civilians in reply to Coke's attacks. Most of these exchanges concern admiralty jurisdiction and not procedure. Surely, many of these players also understood the process of the admiralty courts, but those that didn't showed little hesitation in relying on legal fiction.

Perhaps the best example of this is found in the various comments on the admiralty court's personal jurisdiction. The admiralty may have felt itself plagued with prohibitions in the seventeenth century, but the number of instance suits initiated in London during the first three quarters of the eighteenth century, as reviewed in this enquiry, comes close to 11,000 or almost 150 per annum on average. This number would rise to almost 400 instance suits per annum over the period between 1841 and the merger of the courts in 1875, as confirmed by Rothery's 1867 report to Parliament and the later judicial statistics. The number of prohibitions issued must have been tiny in comparison.

In Quebec, the second most active instance admiralty jurisdiction in the British empire, an average of more than 60 instance suits per annum were initiated in the nineteenth century. By way of comparison, Rothery's report to Parliament confirms that figures in England averaged more than 235 instance suits per annum between 1841 and 1848. In Quebec for the same years, the last years of the period under review for which data is available, the annual average was more than 190 instance suits per annum. There may have been booms and busts in prize jurisdiction, as best illustrated in the 1833 report to Parliament, but these instance courts were not in want of activity. And the present enquiry has revealed that in approximately half of all instance suits initiated during the period under review, a warrant for the arrest of a person was issued.

And yet the common law courts somehow came to the conclusion that personal arrest had either never existed or, if it had, that jurisdiction over the person had been lost at some point. Absent

voluntary appearance, the argument suggests that the admiralty courts would have been unable to compel a defendant to appear. And Coke would even exclude contempt jurisdiction, as it was only available in the superior courts. This has resulted in more modern times in the theory that *in rem* process had been developed as a means of compelling the personal defendant to "voluntarily" appear. *The Dictator* dates from the end of the nineteenth century, but is merely the latest version of this theory, and, notwithstanding the contrary view of the Privy Council in *The Bold Buccleugh*, has led the admiralty courts in England and in Canada to conclude that once the defendant appears, all of his assets must be at risk.

But the theory would appear to be based, at least in part, on legal fiction, a cornerstone of much of English law. The same legal fiction allowed the common law courts to pretend that events took place on land to appropriate jurisdiction from the admiralty courts. In fact, no one bothered to read the records of the admiralty courts in London or in Quebec. The Warrant Books and Action Books do not indeed represent the actual workload of the admiralty courts, any more than Rothery's figures for 1841 to 1866. Of his almost 10,000 suits initiated, only 3,479 resulted in final judgments over those years.[1104] But no admiralty suit got started without being entered in these records, and, at least until 1854, without the issuing of the warrants requested. Had the common law courts effectively put an end to the personal jurisdiction of the admiralty courts, the Warrant Books and Action Books would not look anything like they do today.

However, from 1800, the comments of Browne as to the rarety of personal arrest confirm that the English admiralty courts were in the process of allowing whatever personal jurisdiction they had, to slip into abeyance. This change was not dictated by Parliament, and the 1832 Rules still provided for personal arrest, even if it was to be used sparingly. Nor was the change the fiat of some admiralty judge. Coote's first edition in 1860 still described personal arrest, although his second edition in 1869 did not. The arrest of personal defendants was by then no longer available in England or in Quebec, and the notions of *in rem* and *in personam* process had crystallized. That crystallization marks the end of the period under review in this enquiry.

It may seem strange that a judge of Lord Stowell's stature would not know in 1801 whether the admiralty courts had ever exercised jurisdiction over passenger assault claims. In *The Ruckers*,

[1104] See *supra*, note 632.

he ordered the registrar to look at the records. In an era when judicial statistics had yet to be invented, the only record to be reviewed would be the Warrant Books. However, the registrar did not need to go so far back as 1730. Similar suits were legion in admiralty, in England and in Quebec, and the registrar so states. But Lushington's comments on the absence of personal arrest, made in *The Clara* in 1855, were doubtlessly correct. The court had let abide its personal arrest jurisdiction, and the 1854 enactment had confirmed the availability of *in personam* process for what would formerly have required *in rem* process, but no longer would.

From 1854, process in London was made to differentiate between actions *in rem*, where arrest of property continued, and actions *in personam*, where there would be no further need for arrest. The statute did not need to put an end to personal arrest, as that had already been achieved by attrition. And the High Court of Admiralty Action Book for 1858-59 confirms that no personal arrests were made in any of the more than 600 instance suits commenced during that 14-month period.

This change would be reinforced by the arrival of the common lawyers before the admiralty courts in 1859, by the merger of the admiralty and common law courts in England in 1875, and by the new rules of practice for admiralty in the merged system. It was extended to Quebec by the 1863 and 1867 vice-admiralty enactments, and by the 1884 Rules. Suits were now to be commenced by a writ of summons of a common law flavour. However, until the end of the period under review, the Quebec Vice-Admiralty Court had kept personal arrest very much alive in admiralty.

By Confederation, Canada may have become a country, but its maritime jurisdiction would continue to be controlled by London until the *Statute of Westminster, 1931*. However, the process of the courts of vice-admiralty had crystallized by 1867. The possibility of arresting a person had gone into abeyance forever. And *in rem* arrests were limited to the property that was the subject of the action. All of which brings the reader back to the six queries set out in the introduction to this enquiry.

Roman Law

First, can it be concluded whether admiralty arrest procedure is a descendant of Roman law and procedure? The civilians manning the British admiralty courts were trained in Roman and civil law, but it can be safely stated that Prichard and Yale were correct in their conclusion that admiralty process today referred to as *in rem* and *in personam* is not related to the Roman law procedure of the same nomenclature. This is clear from the overview of actions in Roman law from the time of Gaius to that of Justinian, and from the limited possibilities of seizure that Roman procedure had developed. Although Browne states that "it is said" that Roman law made the ship subject to arrest for a debt of the shipowner, he concedes he is unable to find any authority supporting the theory.[1105]

The Roman *actio in rem* was a claim of title or of some other proprietary interest in contested goods. The goods were not looked upon as security for anything. Rather, the parties disputed the right of use, possession or title to those goods themselves. That concept continues today in the vocabulary of real actions in civil law. A real right attaches to property, and concerns the use, possession or title thereto.

The Roman *actio in personam* was neither related to property, nor to security, although, when combined with the contumacy of the defendant, could lead to the seizure of any assets of the defaulting defendant. But that seizure was no indication that the assets had been in any way involved in the suit, and no title was claimed therto. And where seized assets were sold, it was to the benefit of all creditors, not only of the seizing claimant. The medieval variations of these Roman law remedies were no closer to the admiralty action *in rem* or *in personam*. Only the names come from Roman law.

Seizures before Judgment and Mesne Process

Secondly, is there a relationship between arrest in admiralty law and seizure in continental civil law or mesne process in common law? Medieval civil procedure and continental procedure, whether written or customary, did not include seizure before judgment except in the most timid and exceptional circumstances. Prichard and Yale cite the *Ordo Judiciarum*. That medieval

[1105] Browne, *supra*, note 195, vol. 2 at page 35. See the text accompanying note 350 above.

Italian text is no closer to admiralty process than was the Roman law that preceded it. This is also clear from the review of continental French law, including that portion of French customary law which applied in Quebec until shortly before Confederation, and from the admiralty law codified in the Ordonnance of 1681.

There never was a general remedy in Roman law, in civil law, or in French law, allowing a claimant to seize the person or assets of the defendant *before* judgment. French commercial law had *contrainte par corps*, but only *after* judgment, and France only recognized seizure before judgment as a general remedy in 1955. It took the ratification of the 1952 Arrest Convention to bring it to French maritime law.

That said, the French admiralty courts developed their own more aggressive form of seizures before judgment. The remedy was not even mentioned in the Ordonnance of 1667, or in those of 1673 or 1681, but would become popular in admiralty courts, as has been seen from the Quebec admiralty court registers of hearings. These registers, the most important source of the study of maritime law in New France, confirm that seizures were at the very least tolerated, without contest in many cases. The volatility of maritime assets, even on the River St. Lawrence, was such that it might have naturally led to a remedy to preserve the rights of the claimant.

However, seizures before judgment in admiralty in New France were not limited to the seizure of ships, and could freeze any of the defendant's assets, in his hands or in those of a garnishee. Thus, the volatility argument is no stronger in admiralty than it would have been in the Prévôté. And a review of the registers of hearings in the Prévôté, as they become available, will confirm whether the admiralty's attitude of tolerance of seizures before judgment was maritime in nature or common to both courts. Either way, seizure before judgment was not then, and is not today, the equivalent of the action *in rem*. Seizures before judgment rarely involve security. Rather, the goods themselves are frozen as security, and the owner is often appointed guardian of his own goods.

As to the relationship between admiralty arrest process and common law mesne process of the sixteenth to the nineteenth centuries, it must first be conceded that the relationship, if any, may never be determined with precision. There was no binding effect of common law procedure on the procedure of the civil law courts. However, the *capias* process was in existence in England

and in Quebec throughout the period, and was similar to admiralty arrest *in personam*, at least in the sense that a person was arrested at the outset of the suit and was only released upon providing security. Common law security included security for appearance given to the sheriff, and security for the claim given to the claimant. In admiralty, security was solely for the claim, and the continued participation of the personal defendant was optional, once security had been given for the outcome.

As has been seen, the former United States rules of admiralty, drafted in the 1840s, illustrate a connection in that country between the *capias* process of state courts and the admiralty attachment of the federal courts. The source of the United States Rule B attachment is clearly rooted in both the comments of Clerke and Browne, and in the mesne process of the common law courts. However, it cannot be concluded that the common law had an equivalent effect on admiralty in England or in Quebec. The English and Quebec admiralty courts came to their arrest process by another route.

But the abandoning of personal arrests in admiralty came too early – perhaps as early as 1780 if Lushington is to be believed – to be the result of complaints against mesne process in Dickens' time. It is unclear why personal arrest, so popular in the 1770s, was somehow abandoned by the civilians, without any judgment or legislation to prod it upon them. Were the civilians simply too civilized to continue personal arrests? It seems not, as in Quebec the practice not only continued, but flourished throughout the first half of the nineteenth century. At any rate, the threat of prohibitions from the common law courts does not appear to have effectively prevented personal arrest in England during much of the eighteenth century, or in Quebec during much of the nineteenth.

It may never be known what then led to its progressive demise in England, but the fact that vice-admiralty courts in Quebec kept *in personam* arrest alive throughout the period under review, cannot be seen as the result of a link to common law mesne process, any more than can be the progressive abandonment of the remedy by the High Court of Admiralty. However, the similarities between mesne process and *in personam* arrest are too numerous to be discounted, and the courts could not have been impervious to the public dislike of mesne arrest. It cannot be concluded that these criticisms were ineffective. The decline of personal arrest in the English

admiralty appears to have occurred progressively between 1774 and 1854, when arrest was removed as the sole method of commencement of a suit in admiralty.

Foreign Attachments

Thirdly, is Browne correct in assuming some relationship between foreign attachments and admiralty arrest, and, if so, can the attachment process be revived in admiralty? From the present enquiry, it can be concluded with confidence that the practice of foreign attachments in English municipal charters and in French *villes d'arret* is not the source of admiralty process *in rem*. Browne appears to be in error on this point, and his lamentation of a "recently abandoned" general arrest seems to be pure invention. A general remedy was apparently available in Clerke's day, but had disappeared at least a century before Browne's time.

Nevertheless, Clerke's reference to the arrest of any assets of an absent defendant, and Browne's lamentation for the loss of this possibility, have contributed to the creation of what is now called the Rule B attachment in American admiralty courts, much as did common law mesne process. American authors generally believe in the early existence of the two remedies, with attachment being lost in England some time after the arrival of English maritime law in the American colonies.[1106] The parallel admiralty remedies of attachment and *in rem* process are now securely anchored in American maritime law, and Professor Tetley has argued that if this attachment remedy was lost in England, it might be revived by an admiralty court in Canada as well.

But the parallel remedies in American maritime law result from an erroneous interpretation by Browne of what had always been one arrest process in England, even if the subject of the arrest evolved over the centuries. Browne knew about admiralty practice, at least in Ireland, but was writing at a time when the records and rulings of the civil courts were all but inaccessible to practitioners and academics.

In reality, the present enquiry demonstrates that the attachment remedy was never lost, but rather morphed into the arrest *in rem* of the property that was the subject of the action. This change came about gradually during the seventeenth century, much like the decline of *in personam*

[1106] Davies, "In Defense of Unpopular Virtues: Personification and Ratification" *supra*, note 32, at page 345. Davies cites Tetley and the Supreme Court case of *Manro v. Almeida* to make this assertion.

arrests came about in the eighteenth. As a consequence, no attachment remedy could today be revived by a decision of a court of admiralty.

Personal Jurisdiction

Fourthly, did the British admiralty courts lose, or indeed never have *in personam* jurisdiction? As has been demonstrated, the theory that the admiralty courts had exercised no *in personam* jurisdiction during the period under review is not substantiated by the records in London or in Quebec. This is shown in Tables 1 and 3 above. In fact, personal arrest was very vigorous during the period under review.

In the 75-year period between 1699 and 1774, there were 6,350 suits commenced in London wherein warrants of arrest of persons were issued, 85 each year on average, and more than 50% of all suits commenced in the High Court of Admiralty. During the 85-year period between 1764 and 1848, there were 1,340 suits commenced in Quebec wherein warrants of arrest of persons were issued, 16 each year on average, and more than 40% of all suits before the Quebec Vice-Admiralty Court. As appears from Table 4 above, the Quebec percentage rises to more than 50% if only the nineteenth century is considered.

While the expertise of Prichard and Yale in English admiralty jurisdiction is unparalleled, their assumption that personal suits in admiralty had diminished in England in the eighteenth century was based on a review of warrants issued during the first six months of select years early in the century. As seen from Table 2 above, that assumption may have been premature, as mixed *in rem* and *in personam* suits accounted for 36% of all suits commenced. Added to the purely *in personam* suits, takes that figure to 50% using the methodology of Prichard and Yale. Their study focussed on jurisdiction and not procedure, but their conclusion concerning the demise of *in personam* suits might have been further refined, had they had the benefit of the results of the present enquiry.

In rem and *in personam*

Fifthly, if *in rem* and *in personam* processes were developed over the period under review, why were those very terms not used more often by authors, registrars and judges? It would appear that the answer to this query is more simple than complex. The nature of today's *in rem* and *in*

personam process is, at least in part, different from that which existed at the outset of the period under review in this enquiry. Today, the first still permits the arrest of property, usually a ship, in view of obtaining security for an admiralty claim involving that property. But the second only involves the summoning of a person or body corporate to appear and defend an action before the admiralty court, much as before any other court of justice.

Proceeding *in personam* no longer allows for the arrest of the personal defendant or for the obtaining of security over his assets, absent some truly fraudulent activity which might, in many courts of justice, give rise to interlocutory process in the nature of a seizure before judgment, a Mareva injunction or a freezing order. Proceeding *in rem* allows for the arrest of the property that is the subject of the action in view of obtaining security, even in absence of any fraudulent activity or of any fear that the eventual judgment may not be honoured.

That the modern definition of these terms developed over the period under review, and that the development was demonstrated by the admiralty courts of Quebec can hardly be contested. But the intrigue encountered by Prichard and Yale and many other writers, stems from the fact that the remedies were formerly one. Thus, whether one was proceeding against a person or a ship, the admiralty courts permitted the arrest of the defendant. The adjustment between the arrest of any assets belonging to the personal defendant in Clerke's day, and the arrest of those assets of the personal defendant which could be said to be the subject of the suit, such as the "wrongdoing" ship, came about gradually during the seventeenth century.

As the period under review in this enquiry begins, the *in rem* defendant property had become the wrongdoing property. However, *in personam* process was still identical to *in rem* process. Both involved warrants of arrest, both involved obtaining security, and both could lead to interlocutory arrest in absence of sufficient security. Thus when Clerke describes admiralty process, he refers to the arrest of persons and assets. When Browne describes admiralty process two centuries later, it was no longer possible to arrest any of the personal defendant's assets, but still possible to arrest either persons or property.

By the end of the period under review, arresting persons had ceased, in the courts of common law and of admiralty. It was only at that time that the nuance between *in rem* and *in personam* was crystallized. Prior to that, there was no difference in admiralty between the arrest of the

defendant and the arrest of his assets. Thus, no need to differentiate between the terms *in rem* and *in personam*. It is clear that the two terms were used by English civilians, doubtlessly based on Roman law vocabulary, in view of explaining what was to be arrested.

In that sense, what is today termed *in rem* process could previously have been said to include both the arrest of persons and of property. The civilians knew when they were proceeding against persons and when they were proceeding against property, but felt no need to use terms to differentiate between the two. The key concept was arrest, as that gave rise to the security needed to ensure that the future decree would be honoured. The nomenclature of both could have been simply arrest process, as arrest and security were vital to an international environment.

Thus, *in rem* process today is the sole remaining original admiralty procedure. Today's process *in personam* is a much more modern concept, developed during the period under review, at least in part under the influence of the reforms of common law procedure initiated in the nineteenth century.

Procedural or Personification?

Finally, in answer to the query whether the correct view of admiralty process *in rem* is that of a mere procedural method to compel the owner to appear, or that of the personification of the arrested vessel, the review of the records of the admiralty courts during the period under review would tend to favour the latter view, even though, in English and Canadian admiralty law, the former prevails since the ruling in *The Dictator*.

The procedural theory, whereby the admiralty courts would have had to proceed *in rem* in order to compel the owner of the *res* to appear voluntarily, is simply not reflected in the records. Rather, more than half of the entries in the Warrant Books and Action Books result in warrants of arrest being issued against the person of the owner or master of the vessel. A great many entries are taken against masters or owners and not against the vessel itself. Thus it can no longer be said that *in rem* process was used solely to compel the personal defendant to appear.

Nor do the records sustain the conflict theory, whereby *in rem* process would have resulted from the inability of the admiralty to enjoin personal defendants. The numbers establish clearly that the civilians did not abandon *in personam* arrest for fear of prohibitions. Instead, they show that

the admiralty courts were as involved in the arrest of persons as they were in the arrest of property during the period under review.

That said, whether the personal defendant appears voluntarily in response to the arrest of his property, or appears upon his personal arrest, or appears in response to the service of a summons, the fact is that he comes before the court and becomes a party to the suit. As is any party in a lawsuit, the attorning defendant is subject to the order of the court. The American concept of allowing him to contest the claim on behalf of his arrested asset only, may have been accepted as the rule in some cases in England, but no longer is the rule there or in Canada.

Thus, regardless of whether Jeune was right or wrong in his explanation of the purpose of *in rem* process, his conclusion that an appearing *in personam* defendant should be liable to pay any sum adjudged against him by an admiralty court, as would any other *in personam* defendant, can no longer be questioned. At least since 1854 in England, personal suits could be taken in admiralty, but it would be incorrect to say that the defendant's assets could not be subjected to the order of the court.

The review of the processes of the courts of admiralty sitting in Quebec City during the period under review supports these conclusions. There is no other centre where Roman, Continental, French and English civil and common law come together more coherently. And no field of law more international. Even after the Exchequer Court became Canada's colonial court of admiralty, the local admiralty judges for the province of Quebec continued to sit in Quebec City, such was the maritime tradition of the former capital.

The end of the period under review in this enquiry marks the end of an era in British admiralty law and procedure. The former arrest process, whereby persons were arrested in admiralty, was replaced with modern *in personam* process, whereby a personal defendant is summoned to appear, but is no longer subject to personal arrest. The original arrest process against ships, cargo and freight continued to be available, but only against the property that was the subject of the action. This remedy is today the only procedural connection to the ancient admiralty court arrest procedure. And is doubtlessly related to the concept of maritime liens as they are known today.

But the end of the period under review affected more than mere admiralty procedure. The special jurisdiction of the vice-admiralty courts over Navigation Act offences, passenger ship offences, slave trade legislation offences and piratical property offences was either repealed, or went into abeyance. Suits in damages for assault or battery declined with the gradual reform of seafarers' rights, and the abandonment of mandatory round-trip articles. And the practitioners of Doctors' Commons elected to surrender the charter of the College of Doctors of Law, selling the Great Knightrider Street premises and their legendary library, and putting an end to the civilian order as it was previously known.

In the High Court of Admiralty, the advocate doctors of law constituted an élite group of only a few men at a time, second only to the serjeants-at-law in the Court of Common Pleas. Both orders became the sole source of judges appointed to their respective royal courts. Both orders were so superior, that they constituted orders of dignity with special gowns, the doctors wearing scarlet robes, the serjeants wearing a coif on their wigs.[1107] Both orders would disappear by going into abeyance once all lawyers had access to all courts.

The contribution of the civilians to English law should however not be underestimated. What Dickens referred to as a "little family party" was in fact, as Holdsworth has noted,[1108] a very talented little family, creating almost all of what is now considered to be international maritime law, applicable around the world.

And perhaps the most important contribution of the English admiralty practitioners was the gradual creation of a civilian remedy, geared to the volatility of sea-going vessels, allowing for the interlocutory arrest of persons and of things over which no proprietary or possessory right need be alleged, solely in view of obtaining security for a future judgment. That remedy has today evolved into the admiralty action *in rem*.

However, the overall development of admiralty law and procedure in England and in Canada might have been different. If the British Parliament had chosen to enact the proposed *Admiralty Court Act, 1867*, all limits on the jurisdiction would have been removed, and, although Canada

[1107] For more on serjeants, see Baker, *supra*, note 406.
[1108] See *supra*, note 3, and Holdsworth, *A History of English Law*, *supra*, note 4, vol. XII, at page 50.

would become a country that year, the retaining of vice-admiralty legislative jurisdiction in Britain would have doubtlessly resulted in similar changes to the Quebec court in the ensuing years.

But that legislation was never to be. Perhaps in part because the Unitied Kingdom was on the verge of merging its courts together. Although the first report of the Judicature Commission, recommending the creation of one merged Supreme Court, would only be signed on March 25, 1869, the commission had been issued in September 1867, requesting the commissioners to consider consolidation. Commissioners included Sir Robert Phillimore, England's last civilian judge of the High Court of Admiralty, as well as the admiralty registrar, Henry Rothery.

Phillimore signed the Judicature Commission report recommending the merger, although, in a partial dissent, he spoke against the inclusion of the High Court of Admiralty in the new proposed Supreme Court. He felt a specialized admiralty court was needed for international maritime law. He also noted that the forms of pleading proposed in the report for the new court, were those already in use in the High Court of Admiralty.

Rothery signed the Judicature Commission report without comment. But the proposed *Admiralty Court Act, 1867* also probably failed in part because of Rothery's 1867 report to Parliament. That report demonstrated the absence of any need to enhance the jurisdiction of a court that could at last boast an ever-increasing instance docket. The civilians elected to disband Doctors' Commons at a time when they were finally reaping the fruits of so many years of effort to increase their caseload.

Rothery laments in his 1867 report that the admiralty court was far from possessing all the civil jurisdiction it once had, "which extended over all causes civil and maritime". He hoped that the new bill would restore that status. Had the proposed *Admiralty Court Act, 1867* been adopted, it would have most certainly taken admiralty law and procedure to another level. Even if the bill's lifespan would have been shortened in Britain by the merger of the courts in 1875, its effect in Canada could have been immense, allocating to the Quebec Vice-Admiralty Court a jurisdiction as vast as any admiralty court of the French regime. But its failure, like the failure of so many previous efforts to restore the former glory of the admiralty courts, has at least become another subject upon which admiralty lawyers can romanticize, especially in slower times.

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