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THE SHIP AS AN EXTENSION OF FLAG STATE TERRITORY AND AN ENTITY WITH HUMAN ATTRIBUTES – IS IT TIME TO JETTISON THESE LEGAL FICTIONS?

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Summary: This article questions the need for the use of two legal fictions in modern maritime law: that a vessel/ship can in certain instances be treated as an extension of flag state territory; that a vessel/ship is an entity with human attributes. The article addresses the first 'fiction' mainly in the context of applicable international law as well as English law; the second 'fiction' is addressed mainly in the context of English law although selective reference is made to both primary and secondary legal sources from the United States. The article concludes that the two fictions are only of limited value in modern maritime law.

Keywords: Legal Fictions; Floating Island Theory; Territoriality Theory; Flag State Jurisdiction; Personification Theory; Procedural Theory; *In Rem* Procedure; Arrest of Ships.

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1 Introduction

Legal fictions have been said to 'pervade the law'.[1] In maritime law we find two notable fictions said to have been created by necessity – firstly, in certain instances the ship is treated as an extension of the land territory of a flag state; secondly, in the context of *in rem* proceedings in common law and other jurisdictions, a ship can be treated as a virtual entity with human attributes which can be sued as a defendant in *in rem* proceedings. These fictions, in particular the second one, can be also viewed in an English historical context where admiralty law was considered to be substantially different from other areas of the law; English admiralty courts for a long time operated independently from the common law courts, and both systems competed over the years for supremacy over

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1 LIND, Douglas. The Pragmatic Value of Legal Fictions. In DEL MAR, Maksymilian, TWINING, W. (eds.). *Legal Fictions in Theory and Practice*, Switzerland: Springer 2015, pp. 83–109, at p. 83.

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the subject area of shipping.[2] One can also point to the historical and present background of a process of anthropomorphisation of the ship or vessel which is frequently referred to, even in judgments, as 'she' rather than 'it'. According to Douglas Lind, "among inorganic artefacts, none exceeds the sailing ship as an object anthropomorphized in Western civilization".[3]

This article will address the first 'fiction' mainly in the context of applicable international law as well as English law; the second 'fiction' will be addressed mainly in the context of English law although selective reference will be made to both primary and secondary legal sources from the United States.

2 The 'Floating Island' Fiction

Whereas there can be substantial doubt as to whether a craft or contrivance constitutes a ship or a vessel for the purposes of a specific definition contained in a particular statute, there is no doubt that a ship or vessel has long been seen and treated in law as a special item.[4] It is one of the few items to be endowed with the possibility or likelihood of attribution of nationality[5] which attracts the exclusive jurisdiction of the flag State at least on the high seas in terms of international law;[6] this is in fact a matter of necessity when the ship navigates in areas beyond any national jurisdiction.[7] This approach has been explained by the 'territoriality' principle whereby the ship is described as a 'floating island' or a 'detached part' of the flag state's territory.[8]

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2 See, generally, WISWALL, Francis L. *The Development of Admiralty Jurisdiction and Practice since 1800*, Cambridge: Cambridge University Press, 1970.

3 LIND, Douglas. Pragmatism and Anthropomorphism: Reconceiving the Doctrine of Personality of the Ship, (2009) 22, *University of San Francisco Maritime Law Journal*, pp. 39–121, at p. 43.

4 There are also instances where two ships or a group of ship are treated as one unit in law, as is the case of a tug and tow, or a tug and tows, forming a flotilla, in respect of which there may be on occasion an aggregation of tonnages for the purposes of limitation of liability. See: *The Harlow* (1922) P. 175; *The Smjeli* [1982] 2 Lloyd's Rep. 74.

5 United Nations Convention on the Law of the Sea 1982 [UNCLOS 1982], Article 91.

6 UNCLOS 1982, Article 92.

7 TANAKA, Yoshifumi. *The International Law of the Sea, Third Edition*. Cambridge: Cambridge University Press 2019, p. 190, citing GIDEL, *Le droit international public de la mer*. As to the problems caused in dealing with stateless vessels, see WARNER-KRAMER Deirdre, M., KANTY, Krista. Stateless Vessels: The Current International Regime and a New Approach, (2000) *Ocean & Coastal L.J.*, 2000, Vol. 5(2), pp. 227–243, where reference is made to the statement (1956) by the International Law Commission that '[t]he absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State…'. See Article 92 of the United Nations Convention on the Law of the Sea 1982, in particular sub-article 2 which provides for the assimilation of a ship flying under two flags according to convenience to 'a ship without nationality'.

8 TANAKA, Yoshifumi. *The International Law of the Sea, Third Edition*. Cambridge: Cambridge University Press, 2019, p.190.

The master of a vessel is in some respects an administrator on behalf of the flag state. The master's powers are very wide, and they include both public as well as private law attributions. The master as the person in charge of the vessel can be endowed with powers some of which are not granted by law to the manager of a land-based warehouse, including powers relating to the registration of marriages at sea,[9] as well as a common law power which has been described as 'despotic' in relation to discipline on the ship .[10] The Merchant Shipping (Official Log Books) Regulations of 1981[11] make provision in relation to the procedure relating to births and deaths at sea. The master has the extraordinary power to jettison cargo in cases 'of highest danger and emergency'.[12] He also has duties relating to the employment of pilots in terms of national law, obligations in relation to the International Convention on the International Regulations for Preventing of Collisions at Sea 1972, and various other international conventions. It would appear that the master 'has also power, where a ship is so shattered that the expense of repairing her exceeds her original value, to sell *bona fide* in the interests of all concerned.'[13] According to Foard, J.T., in his work *A Treatise on The Law of Merchant Shipping and Freight*,[14] "…by the law of England, and in conformity to the rules and maxims of that law in analogous cases, the owners are bound to the performance of every lawful contract made by him, relative to the usual employment of the ship. They are bound to this performance by reason of their employment of the ship, and of the profit derived by them from that employment'.[15]

9 See the now defunct section 240 of the 1894 Merchant Shipping Act 1894: "The master of a ship for which an official log is required shall enter or cause to be entered in the official log book the following matters (that is to say),… (6) Every marriage taking place on board with the name and ages of the parties:…" See further, GODDARD, Kathleen S. Marriages at Sea: the Captain's Powers, Past, Present and Future, *Lloyds Maritime and Commercial Law Quarterly*, 2002, pp. 498–519.

10 COLINVAUX, Raoul, P. *Carriage of Goods by Sea, British Shipping Laws*, Vol. 3, London: Stevens & Sons, 1963, paragraph 1543 (Master's powers at common law: "For the safety of the ship and well-being and comfort of all on board, the law has placed despotic power in the hands of the master, who, however, is not to exercise it over the passengers, except in so far as may be necessary for these ends…. But nothing will justify resistance to any exercise of the master's authority required for the discipline of the ship." Reference is made to: *King v Franklin* (1858) 1 F & F 360; *Aldworth v Stewart* (1866) 4 F & F 57. See further section 287 and 288 of the Merchant Shipping Act 1894, now repealed by the Merchant Shipping Act 1995 [1995 c. 21]. See, now, section 101 of the Merchant Shipping Act 1995.

11 Statutory Instrument 1981 No. 569, Annex, Part I.

12 FOARD, James, T. *A Treatise on the Law of Merchant Shipping and Freight*, London: Stevens & Sons, 1880, at p. 231.

13 FOARD, James, T. *A Treatise on the Law of Merchant Shipping and Freight*, London: Stevens & Sons, 1880, at p. 234.

14 London: Stevens & Sons, 1880.

15 FOARD, James, T. *A Treatise on the Law of Merchant Shipping and Freight*, London: Stevens & Sons, 1880, at p. 196.

There are many other powers which a master can exercise; besides the old and anachronistic power to raise money via a bottomry bond in certain circumstances[16], there is undoubtedly a power of the master to declare general average,[17] even though there is no specific reference to such power in any version of the York-Antwerp Rules;[18] nevertheless, according to Buglass, American courts display an unwillingness to question the master's judgment.[19] Richard Lowndes in *The Law of General Average – English and Foreign*,[20] refers to cargo being sacrificed as general average by 'being given in kind as salvage for the remaining cargo'.[21] Lowndes further states that another sacrifice of cargo can consist 'in its being sold at a port of refuge to raise funds for the expenses necessary in order to prosecute the voyage; this right of the master is subject to certain limitations.[22] A notorious English judgment, whose effect has been largely statutorily neutralised,[23] held that the master's authority and power as an employee of the shipowner did not extend to bind the owner on the basis of bills of lading representing goods that were never shipped. This was the case of *Grant v Norway*[24] where Jervis C.J. stated that: "The authority of the master of a ship is very large and extends to all acts that are usual and necessary for the use and enjoyment of the ship; but is subject to several well-known limitations. He may make contracts for the hire of the ship but cannot vary that which the owner has made. He may take up money in foreign ports, and, under certain circumstances, at home, for necessary disbursements, and for repairs, and bind the owners for repayment; but this authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is."[25]

Jervis CJ went on to state that no grounds could be discovered to justify a decision that the master binds the owner to an endorsee of a bill of lading when the master signs a document in respect of goods which were never shipped.[26] This judgment effectively removed the utility of a bill of lading in a situation where the holder of that document is in most need of the receipt function of the bill of lading; this legal anomaly was later remedied by legislative intervention.[27]

16 See FOARD, James, T. *A Treatise on the Law of Merchant Shipping and Freight*, London: Stevens & Sons, 1880, at p. 206.

17 See BUGLASS, Leslie. *Marine Insurance and General Average in the United States*, Third Edition, Maryland: Cornell Maritime Press, 1991 at p. 207.

18 See York-Antwerp Rules 1974, 1994, 2004, 2016.

19 *Ibid*.

20 London: Stevens & Sons, 1873.

21 *Id*., at p. 178.

22 *Id*., at p. 179.

23 See *infra* at footnote 27.

24 (1851) 138 E.R. 263.

25 (1851) 138 E.R. 263, at pp. 271–272.

26 (1851) 138 E.R. 263, at p. 272.

27 Bills of Lading Act 1855 (18 & 19 Vict. c 111); Carriage of Goods by Sea Act 1992 (1992 c 50).

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In the context of the legal fiction being discussed, the ship navigates on the high seas as at least a quasi-extension of the territory of the flag state; furthermore, Article 91 (1) of UN Convention of the law mandates the existence of a genuine link between the ship and the flag State,[28] although this requirement can be a very tenuous one. In the judgment of the Permanent Court of International Justice in the well-known *s.s. Lotus* case,[29] it is stated: "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. … [B]y virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within the territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. …"[30]

Similarly, although with possibly less emphasis on the territoriality element, the International Tribunal for the Law of the Sea in *The Saiga (No. 2)*,[31] went on to state that, in terms of the 1982 Law of the Sea Convention, 'the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State'.[32] However, it must be acknowledged that ships being man-made are not regular territory of the flag State. One must also point out that the European Court of Human Rights (ECHR) has not treated ships as the territory of the flag State, and flag state jurisdiction was deemed as extra-territorial; in *Hirsi Jamaa et al v. Italy*,[33] the ECHR treated flag-state jurisdiction as an extra-territorial exercise: "There are other instances in the Court's case-law of the extraterritorial exercise of jurisdiction by a State in cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, the Court, basing itself on customary international law and treaty provisions, has recognised the *extraterritorial* exercise of jurisdiction by the relevant State".[34]

Furthermore, there are several exceptions to the legal principle of territoriality, one of which relates to piracy and this is embodied in Article 110 (a) of the

28 See GAUCI, Gotthard, AQUILINA, Kevin. The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – The Triumph of Formality over Substance? *International and Comparative Law Review*, 2017, Vol. 17(1), pp. 167–191 at paragraph 2.1.3.

29 P.C.I.J. reports, Series A, No. 10.

30 *Id*., at p. 25.

31 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, Judgment, July 1st, 1999.

32 *Id*., at paragraph 106.

33 (2012) 55 E.H.R.R.21.

34 (2012) 55 E.H.R.R.21, at paragraph 75 (emphasis added). See also paragraph 77.

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United Nations Convention on the Law of the Sea 1982, which encapsulates the universal jurisdiction against pirates as *hostes umani generis*. Other provisions in Article 110 provide for a right of boarding by a warship if there is a reasonable ground for suspecting that a ship is engaged in the slave trade, if the ship is stateless and if there is Article 109 jurisdiction in respect of unauthorised broadcasting.[35] Another exception relates to the right of hot pursuit.[36] Professor Tanaka in his monograph *International Law of the Sea*[37] takes the view that the territoriality theory is not appropriate on the ground that 'the theory …..is contrary to the fact that, in certain circumstances, merchant vessels are subject to the right of visit by foreign warships, and vessels within internal waters and the territorial seas are in principle under the territorial sovereignty of the coastal state.'[38] Helmersen concludes that flag-State jurisdiction is *sui generis* but more similar to territorial than personal jurisdiction.[39]

Perhaps the main reason discrediting the floating island fiction is its lack of application in the context of international refugee law. The legal implications relating to saving life at sea can be very problematic.[40] An inevitable consequence of a ship being strictly treated as an extension of the territory of a flag state would be that, upon rescue, a distressed person at sea will be on the territory of the flag state, particularly when the rescue takes place on the high seas beyond the jurisdiction of any coastal state.

The duty at international law to assist persons at sea is set out in Article 98(1)[41] of the United Nations Convention on the Law of the Sea 1982 and also under customary international law.[42] The obligation is imposed on the flag State and is at times carried out by private mariners. The United Nations Convention on the Law of the Sea 1982 also makes an exception to the rule that innocent passage in territorial waters must be continuous and expeditious in respect of

35 A procedure in respect of the right of visit is provided in Article 110 (2).

36 United Nations Convention on the Law of the Sea 1982, Article 111.

37 *Op. cit.*, *Third Edition*, Cambridge: Cambridge University Press, 2019.

38 *Id.*, at p. 190.

39 HELMERSEN, Sondre, Torp. *The Sui Generis Nature of Flag State Jurisdiction*. [online] Available https://www.duo.uio.no/bitstream/handle/10852/64696/Helmersen-Flag-state.pdf?sequence=4&isAllowed=y p. 15/15. Accessed: 12.01.2021.

40 See KLEPP, Silja. A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea, *International Journal of Refugee Law*, 2011, Vol. 23. No. 3, pp. 538–557.

41 Article 98(1):" Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
a) to render assistance to any person found at sea in danger of being lost;
b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; …".

42 See: TESTA, David. Safeguarding Human Life and Ensuring Respect for Fundamental Human Rights: A Consequential Approach to the Disembarkation of Persons Rescued at Sea, *Ocean Yearbook,* 2014, Vol. 28, pp.555–609; GALLAGHER, Anne, T., DAVID, Fiona. *The International Law of Migrant Smuggling*, New York: Cambridge University Press, 2014, p. 446.

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stopping and anchoring 'for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.'[43] Part of the general legal framework to saving lives at sea is also contained in the 1974 International Convention for the Safety of Life at Sea (the SOLAS Convention and its Protocol of 1988)[44] and also in the International Convention on Maritime Search and Rescue 1979 (the SAR Convention).[45] International legislation is however short on practical solutions once a distressed person, in particular a person claiming asylum, is saved at sea. In terms of SOLAS the Governments of Contracting States undertake to: "ensure that necessary arrangements are made for distress communication and coordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons."[46]

The SAR Convention further provides that 'on receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided'.[47] 2004 amendments to SOLAS include a new paragraph 1-1 in Regulation 33 of Chapter 5: "1-1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable."[48]

If it is accepted that the ship is part of the flag State's territory, a person will effectively be on the flag State's territory as soon as rescue is effected and the distressed person is on the vessel; the flag state will then have all the obligations

43 UNCLOS 1982, Article 18(2).

44 IMO, Consolidated Edition 2020.

45 Subsequently amended.

46 SOLAS Convention, Chapter 5, Regulation 7(1).

47 SAR Convention, Article 2.1.1.

48 MSC res., 153 (78) (2004), Annex, Amendments to Chapter V, Regulation 33. See also SAR new paragraph 3.1.9 in terms of an amendment to SAR 1978 by MSC 155(78) adopted on 20 May 2004.

towards that person as it would to a person in similar circumstances on its land, particularly the right to a proper procedure for the assessing of request to asylum, as the previously distressed person is already within its territory. Such an interpretation would lead to an inevitable difficulty as at least some flag states would undoubtedly resist the admissibility of refugees into its 'extended' land territory after rescue at sea, and the practical effectiveness of Article 98 of UNCLOS 1982 would be inevitably diminished. However, it could also lead to the exposure of the complete lack of a genuine link between a ship and a flag state where that ship is flying a flag of convenience. Such a development would undoubtedly lead to a rethinking of the current policy of many flag states of granting ship registration on the basis of a mere formality. The right of any state to grant nationality to a ship based on the most tenuous of links as envisaged by the International Tribunal for the Law of the Sea,[49] thereby extending the flag State's quasi-territorial jurisdiction, to all its ships on the high seas should surely be balanced by the obligation of a flag State to carry out certain duties. Solutions to the legislatively unresolved dilemma hovering in the overlap between international maritime law and international refugee law have been suggested: the disembarkation of the rescued at next port of call; temporary admission of a refugee.[50] A solution which is more straightforward in theory, but unlikely to work in practice in most cases, would be the treatment of a ship as the complete equivalent to the territory of a flag State and the application of the relevant legislation accordingly, for instance, the application by a European Union State of Regulation (EU) No. 604/2013[51] consistent with the ship being part of the flag State's land territory. However, such 'obligations' of the master and the flag State have been given short shrift as potentially leading to 'a distorted and arbitrary allocation of asylum responsibilities'.[52]

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49 See *The Saiga (No. 2)* judgment, where it was stated that that 'the purpose of the provisions of the convention [UNCLOS 1982] on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.' *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, Judgment, July 1st, 1999, paragraph 83.

50 BARNES, Richard. Refugee Law at Sea, *International and Comparative Law Quarterly*, 2004, Vol. 53(1), pp. 47–77 at pp. 71–72.

51 Dublin III Regulation (Regulation EU No. 604/2013), "Article 13(1): Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place." The said Regulation does not seem to envisage a ship as part of the land territory of the flag state, but simply as a mechanism of crossing that border.

52 BARNES, Richard. Refugee Law at Sea, *International and Comparative Law Quarterly*, 2004, Vol. 53(1), 47–77 at p. 67.

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However, an asylum seeker rescued by a vessel on the high seas is subject to the jurisdiction of the flag state as soon as they find themselves on that vessel for the purposes of criminal law, and there is no reason in theory why the international refugee law as implemented by the flag state should not be also applicable at that time.

It is quite interesting to note that whereas several states are quite willing to take over the financial benefits of ship registration on the basis of a mere formality,[53] concomitant obligations of a humanitarian nature are regularly shrugged off, despite the fact that it can be strongly argued that international legislation intended to protect refugees extends beyond land territory to areas where a State has jurisdiction.[54] However, flag State interests will most likely refute the obvious consequence of treating their vessels as being on a par with their land territory, despite the statement in *The Lotus* judgment that 'by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory'.[55] Tragedies are likely to occur in instances where vessel owners and their crews avoid their legal obligation to save lives on the high seas in a quest to steer clear of the complications associated with transportation of asylum claimants to the flag State. Customary and Convention law relating to the obligation to save lives at sea and search and rescue legislation would end up being openly flouted in the harsh reality of the world's oceans and seas.

3 The Ship as a Person – The *in rem* procedure and arrest of ships

Arrest of ships has been said to be an 'ancient institution' whose origins are shrouded in a degree of uncertainty,[56] although it has been asserted that there is evidence of ship arrest in ancient Rhodian law.[57] Arrest of ships is available in most national legal systems[58] and is addressed at international level in the 1952 and 1999 Arrest Conventions. [59] Ship arrest is intimately associated with the development of the English Admiralty Court, which has a history based on civil

53 See *supra* at footnote 28.

54 See BARNES, Richard. Refugee Law at Sea, *International and Comparative Law Quarterly*, 2004, Vol. 53(1), pp. 47–77 at p. 68.

55 September 7, 1927, Publications of the Permanent Court of International Justice, *The case of the S.S. Lotus*, at p. 25.

56 RUIZ ABOU-NIGM, Veronica. *The Arrest of Ships in Private International Law*, Oxford: Oxford University Press, 2011 at paragraph 2.20.

57 RUIZ ABOU-NIGM, Veronica. *The Arrest of Ships in Private International Law*, Oxford: Oxford University Press, 2011 at paragraph 2.14.

58 See RUIZ ABOU-NIGM, Veronica. *The Arrest of Ships in Private International Law*, Oxford: Oxford University Press, 2011 at paragraph 2.06. See paragraphs 2.07–2.10 for a brief discussion of the various approaches to arrest of ships.

59 The International Convention Relating to the Arrest of Sea-going Ships 1952; International Convention on Arrest of Ships, 1999.

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law[60] as distinct from the common law.[61] Admiralty jurisdiction itself has also been said to have origins 'shrouded in uncertainty'.[62] The *in rem* procedure available in English law, which is in part explainable by the civilian basis of admiralty law,[63] is linked to the procedure of ship arrest, in terms of which a legal procedure is effected against the ship itself, and is based on what is essentially a legal fiction that the ship can be a defendant in a court case,[64] i.e. the ship is 'treated as a "juristic entity" bound by its contracts and responsible for its torts'.[65] The 'personality' of the ship has been referred to as a fantastic fiction' [66] by Douglas Lind who provides a very interesting history of this fiction in United States law; he states that this fiction came about 'in response to a troubling jurisdictional weakness in the country's nascent admiralty law' where 'shipowners were routinely evading responsibility for violating embargo laws and for carrying outlawed cargo'.[67] The ship personification doctrine has been referred to by the same author as 'ontologically wild a fiction as any the law has ever known';[68] Lind also cites John Chipman Gray belittling the doctrine as a 'barbarous notion'.[69] In his article *Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship*,[70] Lind rightly states that the 'ship personification doctrine

60 See: CUMMING, Charles. The English High Court of Admiralty, (1992) 17 *Tulane Maritime Law Journal*, pp. 209–255, at p. 226; HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, 81–112, at p. 82.

61 See RUIZ ABOU-NIGM, Veronica. *The Arrest of Ships in Private International Law*, Oxford: Oxford University Press, 2011 at paragraph 2.24.

62 LAING, Lionel, H. Historic Origins of Admiralty Jurisdiction in England, *Michigan Law Review,* 1946, Vol. 45(2), pp. 163–182, at p.163.

63 See: CUMMING, Charles. The English High Court of Admiralty, 1992, Vol. 17, *Tulane Maritime Law Journal*, pp. 209–255, at 210, 230; HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, 81–112, at 81–82.

64 See: CUMMING, Charles. The English High Court of Admiralty, 1992, Vol. 17, *Tulane Maritime Law Journal*, 209–255., at p. 230.

65 HEBERT, Paul Macarius. *Origin and Nature of Maritime Liens*, 1929–30, Vol. 4: 3 *Tulane Law Review,* pp. 381–408, at p. 282.

66 LIND, Douglas. The Pragmatic Value of Legal Fictions, Chapter 5. In DEL MAR, Maksymilian, TWINING, W. (eds.). *Legal Fictions in Theory and Practice*, Switzerland: Springer 2015, at p. 95.

67 *Ibid*. Lind refers to the judgment in *United States v. The Little Charles* (1818) where Judge John Marshall stated: "[T]his is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner."

68 LIND, Douglas. The Pragmatic Value of Legal Fictions, Chapter 5. In DEL MAR, Maksymilian, TWINING, W. (eds.). *Legal Fictions in Theory and Practice*, Switzerland: Springer 2015, p. 96.

69 *Ibid*.

70 2009, Vol. 22(1) *University of San Francisco Maritime Law Journal*, pp. 39–121.

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persists' due to 'its idiosyncratic fusion of those two philosophical notions, pragmatism and anthropomorphism'.[71]

However, in a maritime dispute, it is not only the ship or vessel which can constitute the *res* and is thus anthropomorphized; the cargo in a ship, freight at risk and passenger fares at risk can also constitute *res*.[72] Very recently, cargo salved from a wreck of the *SS Tilawa* was one of the defendants in a claim *in rem* in the Queen's Bench Division (Admiralty Court) in the case *Argentum Exploration Ltd v. The Silver and all persons claiming to be interested in and/or to have rights in respect of, the Silver.*[73]

The maritime lien (strongly linked to the civil law *privilege maritime*[74]), at times referred to as a tacit hypothecation[75] and as being a quasi-proprietary right[76] is distinct from the common law lien, can be said to be a *jus in re* and is the 'substantive concept'[77] that underlies proceedings *in rem*.[78] Essentially, proceedings *in rem* are a mechanism to perfect maritime liens and in English law also to perfect statutory rights *in rem*. The maritime lien has been described as 'a claim or privilege upon a maritime *res* to be carried into effect by legal process.'[79] Significantly, it has also been said that: "Perhaps the most important part of the purely maritime jurisdiction of the Admiralty Division is to be found in the doctrine of maritime lien. This, which is unknown to the common law, and is quite distinct from an ordinary possessory lien, is a right to enforce by legal process a claim against the *res* or thing itself, which is either the cause of injury in case of collision, the object saved by salvors, the vessel on which service has been performed by mariners, or the security of a bottomry bond….The lien extends

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71 *Id.*, at p. 41.

72 MCGUFFIE, Kenneth et al. *Admiralty Practice, Vol 1, British Shipping Laws*, London: Stevens & Sons, 1964, paragraph 69.

73 [2020] EWHC 3434 (Admiralty). Judgment states in paragraph 5 that the claim was served on the bars of silver. See further paragraph 17 of said judgment.

74 See HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, pp. 81–112, at p. 108.

75 Story, J., in *The Nestor* (18 Fed. Cas. 9 (Case No. 10, 126) (1831) stated: "…a lien by the maritime law is not strictly a Roman hypothecation, though it resembles it, and is often called a tacit hypothecation. It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors."

76 See HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, 81–112, at p. 88.

77 GILMORE, Grant, and BLACK, Charles, L., *The Law of Admiralty, 2nd edition*, Foundation Press, 1975, p. 35. See *The Bold Buccleugh* 76 Moo. P.C. 267 at p. 284, per Sir John Jervis. For a critique on this general approach, see The *Henrich Bjorn* 11 App. Cas 270, at pp. 283–4.

78 See *The Bold Buccleugh* (1851) VII Moore, P.C. 267 at p. 283 *et seq*.

79 HEBERT, Paul Macarius. Origin and Nature of Maritime Liens, 1929–30, Vol. 4:3 *Tulane Law Review*, pp. 381–408, at p. 381.

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to the whole of the ship whilst she remains entire, and to all parts of her if she should be wrecked and broken to pieces."[80]

Maritime liens carry certain attributes which are of utmost substantive and procedural importance to a maritime creditor; they are perhaps best described in the words of Sir John Jervis in *The Bold Buccleugh*:[81] "This claim … travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached. It is not necessary to say that the lien is indelible and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosoever possession the thing may come."[82]

Furthermore, maritime liens and the statutory list of causes of action giving rise to a right to proceed *in rem* in terms of section 20(2) of the Senior Courts Act 1981[83] all require a substantial link between the ship itself and the claim. Perhaps this can be best illustrated by referring to two specific provisions within the said section 20(2). The right *in rem* provided by Section 20(2)(e) of the Senior Courts Act 1981 refers to 'damage done by a ship', which has been described by Lord Diplock in The *Escherscheim*[84] as a 'figurative phrase'[85] and 'a term of art in maritime law whose meaning is well settled by authority'.[86] Lord Diplock went on to explain: "To fall within the phrase not only must the damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship, but the ship itself must be the actual instrument by which the damage is done."[87]

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80 ROSCOE, Edward, Stanley. *A Treatise on the Jurisdiction and Practice of the Admiralty Division of the High Court of Justice*, London: Stevens and Sons, 1882, p.6.

81 (1851) VII Moo. P.C. 267.

82 *Id.*, at pp. 284–285. See also *The Ripon City* [1897] P. 226 where Gorell Barnes J., stated that: "[The maritime lien] is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another – a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing." [*Id.*, at p. 242].

83 (1981) c. 54, originally bearing the title Supreme Court Act 1981, and renamed by the Constitutional Reform Act 2005. Statutory developments have led to a distinction between maritime liens and statutory rights *in rem* (the latter are at times referred to as statutory liens (See *The St Merriel* [1963] P. 247 at p. 253). A distinction is also made between actions *in rem* and actions quasi *in rem*. (see MEESON, Nigel. *Admiralty Jurisdiction and Practice*, *Second Edition*, London: LLP, 2000, at paragraph 1-053).

84 [1976] 1 W.L.R. 430; case related to the previous legislative incarnation of the wording in the Administration of Justice Act 1956.

85 *Id.*, at p. 438.

86 *Ibid.*

87 *Ibid.*

In contrast section 20(2) (d) of the same statute gives rise only to the *in personam* jurisdiction of the Admiralty Court in respect of 'any claim for damage received by a ship'.[88]

The justification for *in rem* proceedings has been said to be that a ship is a highly mobile asset used in international trade and therefore a powerful remedy is necessary.[89] It can be viewed as a precautionary mechanism which ensures that a legal remedy is available via the immobilisation of what would otherwise be a highly movable asset of a personal debtor who is likely to be out of, or about to move out of, of the jurisdiction; jurisdiction is indeed 'grounded by the presence of the *res* in the jurisdiction'.[90]

In early English Admiralty procedure, the action was substantially one against the defendant in person and not the ship;[91] one has to keep in mind that the Roman law distinction between actions *in rem* and actions *in personam* referred to remedies and not rights.[92] Edward Ryan citing Vinogradoff's *Roman Law in Medieval Europe* states that "It was not until the common law prohibitions forced the Admiralty into the position that it 'might have jurisdiction *quoad* the *res*, though not *quoad* its owners'[93] that the 'English lawyers did not simply copy their Roman models but borrowed suggestions from them in order to develop them in their own way.'[94]

88 See sections 20–21 of Senior Courts Act 1981.

89 RUTHERGLEN, George. The Contemporary Justification for Maritime Arrest and Attachment, (1989) 40 *William and Mary Law Review*, 1989, Vol. 40, pp. 541–579, at p. 542.

90 See HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, pp. 81–112, at p. 88.

91 See RYAN, Edward, F. Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective, *Western Ontario Law Review,* 1968, Vol. 7, pp. 173–200, at p. 190.

92 *Ibid*.

93 The author of the said article refers to the judgment of Jeune, J., in *The Dictator* [1892] P. 304. In that judgment at pp.310–311, it is stated: "There can, I think, be no doubt that the Courts of Common Law always clearly drew the distinction between the case of the Court of Admiralty having jurisdiction by reason of hypothecation, or lien, or other reason over a res, and that Court seeking to exercise jurisdiction against individuals personally, with regard to whom no such jurisdiction in the view of the Courts of Common Law existed, and, while they allowed the action to proceed in regard to the former matter, prohibited it as to the latter: *Johnson v. Shippen* approved by Blackburn, J., in *Castrique v. Imrie*; and probably the Court of Admiralty, in cases such as *The Ruby Queen*, recognised that that Court might have jurisdiction *quoad* the res, though not *quoad* its owners. But the Admiralty Court, it would appear, did not in early times treat the action in rem as a specific and distinct form of action."

94 RYAN, Edward, F. Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective, *Western Ontario Law Review,* 1968, Vol. 7, pp. 173–200, at p. 190. See further RUIZ ABOU-NIGM, Veronica. *The Arrest of Ships in Private International Law*, Oxford: Oxford University Press, 2011 at paragraph 2.21.

The *in rem* procedure is consistent to an extent with the idea that a ship is entitled to nationality in a way similar to a human being.[95] Indeed the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels 1924) as amended by the Brussels Protocol 1968 (the Hague-Visby Rules), refers to the ship on the same level as any other defendant and endows both the ship and the carrier with limitation of liability on a per package, unit or kilogramme basis.[96] The United Nations Convention on the Carriage of Goods by Sea, 1978 (The Hamburg Rules) takes a different approach referring solely to the carrier (rather than referring also to the ship) on this specific point.[97] The International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships 1957, Article 6, states that the liability of the shipowner includes the liability of the ship itself. Similarly, the Convention on Limitation of Liability for Maritime Claims 1976 provides that for the purposes of the said Convention 'the liability of a shipowner shall include liability in an action brought against the vessel herself.'[98]

As part of general admiralty jurisdiction, the ship (as a *res*) and its owners widely defined are in a substantial number of legal systems endowed with the facility and privilege[99] of limitation of liability primarily based on tonnage of the vessel; limitation is frequently accompanied by the imposition of liability insurance.[100] As indicated above, there are other mechanisms based on a per package/per unit basis in respect of carriage of goods by sea in terms of the Hague, Hague-Visby, Hamburg and Rotterdam Rules. The law applicable to the tonnage limitation in the United Kingdom is contained in the Merchant Shipping Act 1995[101] which implements into national law the provisions of the London Limitation of Liability for Maritime Claims Convention 1976/1996. A United States statute provides a system of limitation of liability based on the salved value of the vessel.[102] This approach is similar to the Roman Law notion of *noxae deditio*, or

95 See GAUCI, Gotthard, AQUILINA, Kevin. The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – The Triumph of Formality over Substance? (2017) 17(1) *International and Comparative Law Review*, 2017, 167–191.

96 Hague-Visby Rules, Article IV (5)(a).

97 See Hamburg Rules 1978, Article 6.

98 *loc. cit.*, Article 1 (5).

99 See: GAUCI, Gotthard. Limitation of Liability in Maritime law: An Anachronism? *Marine Policy*, 1995, Vol. 19(1), pp. 65–74; GAUCI, Gotthard. Compulsory Insurance under EC Directive 2009/20/EC – an adequate solution for victims, or is it also time for the abolition of maritime limitation of liability and the establishment of an international fund as an insurer of last resort? *Journal of Maritime Law & Commerce*, 2014, Vol. 45(1), pp. 77–96.

100 See, for instance, International Convention on Civil Liability for Oil Pollution Damage, 1969 and the 1992 Protocol to amend the said Convention.

101 1995 c. 21.

102 U.S.C., Title 46 Chapter 8, paragraph 183 provides: "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or

noxal surrender, in terms of which an owner could discharge liability for damage to another individual by giving up on the offending instrument; a similar approach can be found in Article 3 of the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels 1924. According to Hunter, '[n]oxal surrender seems to be a relic of the ancient practice of surrendering a wrongdoer to the injured party, who was thereby enabled to wreak his vengeance on him'.[103] Most systems of limitation of liability for damage caused by a ship do not adopt the salved value approach but use the tonnage limitation system; however, both systems grant a degree of pre-eminence to the ship rather than its owner as a defendant. The limitation fund constituted in terms of the 1976/1996 Convention on Limitation of liability for Maritime Claims can lead to the release of the arrested or attached *res* and to this extent the fund itself substitutes the vessel as the *res*,[104] although the Convention itself does not itself refer to the ship or vessel as a defendant (unlike the Hague and the Hague-Visby Rules).[105]

There are two schools of thought in relation to liens[106] and the action *in rem*, i.e., one based on the personification theory and the other on the procedural theory. The first functions on the basis that the ship is akin to a person and therefore can be a defendant (although not a claimant) in an action in certain circumstances in the Admiralty Court;[107] furthermore, arrest of a *res* has survived the abolition of arrest of a person in respect of a civil debt; both arrest of person and the *res* were possible in terms of the *Praxis Curiae Admiralitatis Angliae.*[108] The personification theory was probably best described in the following words of Justice Brown in the 1902 United States case *Tucker v. Alexandroff*:[109] "A ship

for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except ……, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending….".

103 HUNTER, W.A. *A Systematic and Historical Exposition of Roman Law*, *Fourth Edition*, London: Sweet & Maxwell, 1803, at p. 167.

104 Convention on Limitation of Liability for Maritime Claims 1976/1996, Article 13. See also Article VI of the International Convention on Civil Liability for Oil Pollution Damage 1992.

105 Hague Rules (1924), Article IV (5) and Hague-Visby Rules (1924/1968), Article IV (5)(a).

106 TETLEY, William. *Maritime Liens and Claims*, London: Business Law Communications Ltd, 1985, p.35.

107 See TETLEY, William. *Maritime Liens and Claims*, London: Business Law Communications Ltd, 1985, p. 35. See also *The Bold Buccleugh* (1851) VII Moore, P.C. 267 at pp. 282–283, where Sir John Jervis is reported as stating that: "If the owners do not appear to the warrant arresting the ship, the proceedings go on without reference to their default, and the decree is confined exclusively to the vessel' (at p. 283).

108 See LAMBERT MEARS. Thomas. The History of the Admiralty Jurisdiction, *Select Essays in Anglo-American Legal History*, Vol. 2 1908, pp. 312–364, at p. 343 *et seq.*

109 183 U.S. 424, 438 (1912), as cited in HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, pp. 81–112, at pp. 94–95.

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is born when she is launched, and lives so long as her identity is preserved…[I]n the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner and be sued in her own name."

Similarly in 1800 it had been stated that 'the ship itself is responsible in the admiralty, and not the owners.'[110] Hutton refers to the U.S. Supreme Court judgment in *The Barnstable*[111], where a maritime lien attached to the *res* even though the owner was not liable (the vessel was under the control of a charterer).[112] The same author refers to the case of The *Little Charles*[113] as supporting the proposition that the 'personality theory would hold a vessel, or a *res*, liable even if stolen.'[114]

In the English legal system, Practice Direction 61.3 which provides for the manner of service on the property itself,[115] is subject to the consistently applied English law doctrine 'that the ship is not liable unless the owner or his servants are responsible.'[116] However, while it would appear that the ship is clothed with the responsibilities normally attributed to a person, rights only vest in the person who is the owner. There appears to be no evidence in English law that a ship can sue in its own right, or that an individual can sue on behalf of a ship as a person can sue on behalf of a company or corporation.

The second, i.e., the procedural theory, functions on the basis that the *in rem* action is a mere procedural technique to force the real defendant, i.e. a human being or company/corporation, to submit to the jurisdiction of the Admiralty

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110 MAXWELL, John I. *The Spirit of Marine Law*, as cited in RUIZ ABOU-NIGM, Veronica. *The Arrest of Ships in Private International Law*, Oxford: Oxford University Press, 2011, at paragraph 2.35.

111 181 U.S. 464 (1901).

112 See HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, 81–112, at p.95.

113 26 Fed. Cas. 979 (C.C.D. Va. 1818) (No. 15, 612).

114 See HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, 81–112, at p. 96.

115 "3.6 A claim form *in rem* may be served in the following ways:
(1) on the property against which the claim is brought by fixing a copy of the claim form –
(a) on the outside of the property in a position which may reasonably be expected to be seen; or
(b) where the property is freight, either –
(i) on the cargo in respect of which the freight was earned; or
(ii) on the ship on which the cargo was carried; …"

116 HEBERT, Paul Macarius. Origin and Nature of Maritime Liens, 1929–30, Vol. 4:3, *Tulane Law Review*, pp. 381–408, at p. 390, where two exceptions to this doctrine are mentioned, i.e., 'cases of seamen's wages and damages occasioned by agents of the charterers who are considered owners *pro hac vice*.'

Court.[117] In the English legal system, the procedural theory dates back at least to a decision in the case of *The Dictator* by Sir Francis Jeune.[118]

The two aforementioned theories have been an object of considerable debate over the years. Some have looked at the maritime lien in the context of the contest between the common law courts and the Admiralty courts.[119] It would appear that the currently acceptable theory in England is the procedural theory, and this point was addressed in the case of *The Indian Grace (No.2)*[120] where Lord Steyn discussed the issue in a historical context and went on to state that for the purposes of section 34 of the Civil Jurisdiction and Judgments Act 1982[121] the action *in rem* was an action against the owners as from a very early stage, i.e. the moment of service of the claim form: "The idea that a ship can be a defendant in legal proceedings was always a fiction. But before the Judicature Acts this fiction helped to defend and enlarge Admiralty jurisdiction in the form of an action *in rem*. With the passing of the Judicature Acts that purpose was effectively spent. That made possible the procedural changes …It is now possible to say that for the purposes of section 34 an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or, where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service….From that moment the owners are parties to the proceedings in rem."[122]

Previously, in *The Tervaete,*[123] Scrutton L.J. had stated that it was his view that 'it is now established that procedure *in rem* is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property."[124] In the same judgment Atkin L.J. had made the point that the owners of the vessel are named as parties to the *in rem* proceedings,[125] and 'if they appear, subject to the statutory right to

117 Edward Stanley Roscoe espouses a variant of the procedural theory (See HUTTON, Neill. The Origin, Development, and Future of Maritime Liens and the Action in Rem, *Tulane Maritime Law Journal*, 2003, Vol. 28, 81–112, at, at p. 101 *et seq*.

118 [1892] P 304. See *The Indian Grace (No. 2)* (1998) 1 Lloyd's Rep. 1, at p. 7, per Steyn L.J.

119 See TETLEY, William. *Maritime Liens and Claims*, London: Business Law Communications Ltd, 1985, at p.36.

120 (1998) 1 Lloyd's Rep. 1.

121 [1982 c. 27]. Section 34 provides:
"No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

122 (1998) 1 Lloyd's Rep. 1, at p. 10.

123 (1922) 12 Ll. L. Rep. 252.

124 *Id*., at p. 254.

125 See, however, MEESON, Nigel, KIMBALL John. *Admiralty Jurisdiction and Practice, 5*th

limit liability, they will be made liable personally for the full damage regardless of the value of the *res*."[126] However, it can be observed that in default of appearance of the owner, the action continues *in rem* and can lead to the sale of a vessel by order of the Admiralty Court. Furthermore, the procedural theory fails to 'explain the ability of the maritime lien to follow the vessel'.[127] It is clear that *the Indian Grace (No. 2)* decision goes beyond what was stated by Fletcher Moulton L.J. in *The Burns*[128] i.e., "I am, therefore, of opinion that the fundamental proposition of the argument of the appellants' counsel fails, and that the action *in rem* is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action."[129]

It has been suggested that *The Indian Grace (No. 2)* decision on the nature of the *in rem* action should not be applied other than in the context of section 34 of the Civil Jurisdiction and Judgments Act 1982.[130] However, *The Indian Grace (No. 2)* decision is consistent with the decision of the European Court of Justice in *The Maciej Rataj*[131] where it had been decided that: "Consequently, the answer … is that a subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a Court of a Contracting State, is an action *in personam* for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a Court of another Contracting State by way of an action *in rem* concerning an arrested ship, and has subsequently continued both in *rem* and *in personam*, or solely *in personam*, according to the distinctions drawn by the national law of that other contracting state."[132]

Edition, London: LLP, 2017, paragraph 4.4, where it is stated that 'it has long been the practice in the Admiralty Court for parties to be described rather than named…'.

126 (1922) 12 Ll. L. Rep. 252, at pp. 255–256.

127 See TEARE, Sir Nigel. The Admiralty action *in rem* and the House of Lords, *Lloyd's Maritime and Commercial Law Quarterly*, 1998, pp. 33–42, at pp. 33–34.

128 (1907) P. 137.

129 *Id*., at p. 149.

130 TEARE, Sir Nigel. The Admiralty action *in rem* and the House of Lords, *Lloyd's Maritime and Commercial Law Quarterly*, 1998, pp. 33–42, at pp. 41–42.

131 (1995) 1 Lloyd's Rep. 302. Case was referred to the European Court of Justice by the English Court of Appeal and related to on the interpretation of articles 21, 22 and 57 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978 Accession Convention ("the Brussels Convention").

132 *Id*., at paragraph 48.

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However, both *The Indian Grace (no. 2)* and *The Maciej Rataj* judgments do not extend to provide complete parity between an action *in personam* and an action which proceeds exclusively *in rem* in relation to the 'same' maritime claim.

It can be convincingly argued that both schools of thought have some merit. Proponents of the personification theory will undoubtedly find comfort in that part of the *in rem* action which permits the vessel to be sold with a completely clean slate by court auction in the event that the owner of the ship does not enter an appearance.[133] Support for the personification theory is strong and predominant in the United States where jurisprudential history displays the contrasting views of Judges Marshall and Story on the one hand and Judge Holmes on the other.[134] However, the personification theory taken to its extreme would allow the ship to be a claimant in its own right, and as, stated earlier, this is not the case at least in English law. However, an interesting point addressed in English case-law is that an action *in rem* can be pursued in an instance where, because of a change of ownership after commencement of action (but before service of the claim form or arrest) and in the absence of a maritime lien, there is no possibility of an action *in personam.*[135] Furthermore, the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952 does not include a ship or vessel within the definition of 'person' in Article 1(3), although it is not excluded.[136]

A Canadian academic has argued that a hybrid of the two theories is applied in modern Canadian Admiralty practice: "In modern Canadian practice, certain elements of both the procedural and personification theories persist, and it may be argued that Canada has adopted a hybrid of the two schools of thought … Canadian law requires that there be a ship or other property that is 'the subject of the action', without which there can be no *in rem* proceeding at all. Furthermore, some substantive elements of modern maritime law, such as limitation of liability based on the size of the ship, are reminiscent of the notion that the amount

133 See: *The Acrux* (1962)1 Lloyd's Rep. 405; *The Cerro Colorado* [1993]1 Lloyd's Rep. 58; Draft Instrument on the Judicial Sale of Ships (United Nations General Assembly A/CN.9/WG.VI/WP.87 (11 February 2020).

134 See LIND, Douglas. Pragmatism and Anthropomorphism: Reconceiving the Doctrine of Personality of the Ship, *University of San Francisco Maritime Law Journal*, 2009, Vol.22(1), pp. 39–121.

135 See *The Monica S* (1967] 2 Lloyd's Rep. 113, 132, cited by Francis L. WISWALL, *The Development of Admiralty Jurisdiction and Practice since 1800*, (Cambridge University Press, 1970) at p. 149. In the said judgment, Brandon, J., stated with reference to the Administration of Justice Act 1956, that:
"I see no reason, as a matter of construction of the Act, for implying a further provision that, in cases where the claim does not give rise to a maritime lien, if there is a change of ownership after action brought but before service or arrest, the right which is given to proceed *in rem* against the ship is thereupon to lapse".

136 The same point can be made about Article 1(3) of the International Convention on Arrest of Ships, 1999.

recovered cannot exceed the value of the wrongdoing ship. However, Canada is a 'sister-ship' arrest jurisdiction, in which, in some cases, a ship other than that which is 'the subject of the action', may be arrested in its stead, if the two ships are commonly owned. It is suggested that, as a device to compel the shipowner, as opposed to the ship, to honour its obligations, this is a modern manifestation of the procedural theory."[137]

This view can arguably be also used to describe the *in rem* action as applied in the English Admiralty Law system which, like the Canadian counterpart, provides for sister-ship arrest in certain instances envisaged in terms of Section 21(4) of the Senior Courts Act 1981.

Considering the ship as a different defendant from its owner is an artificial barrier to claimants who can otherwise face the situation of having to commence an *in personam* action against the shipowner in those situations where a claimant following an *in rem* action on the basis of a maritime lien and possibly also in those cases of a mere statutory right *in rem*, recovers judgment and remains only partially satisfied.[138]

4 Conclusion

The Floating Island fiction: This theory, although of importance symbolically and reflective of extensive flag state jurisdiction, has only limited value. A vessel is broadly treated as an extension of land territory of the flag state for criminal law purposes on the high seas and flag state regulatory purposes. There are a number of instances within UNCLOS 1982 where the law clearly distinguishes the ship from the land territory of the flag state. As stated earlier, Tanaka considers the territorial theory as not appropriate, and although the said theory has some limited and important value, a ship cannot be considered full flag state territory beyond territorial waters, particularly in international refugee law, where the treatment of a ship as an extension of land territory is given a particularly wide berth.

The Ship Personality Fiction: Admiralty law can survive largely unaffected without the need for proceedings *in rem,* and what is at present an action against the ship can be treated as merely a limitedly available civil law action where jurisdiction *in personam* would be founded exclusively on the basis of presence within the jurisdiction of the owner's *res* accompanied by an injunction against the master and crew prohibiting departure of the *res* from the particular location where it is located within the jurisdiction. This approach would remove the artificiality of the barrier between *in rem* and *in personam* proceedings. However,

137 GOLD, Edgar, et al. *Maritime Law*. Ontario: Irwin Law 2003, p.751.

138 See: *Nelson v. Crouch* (1863) L.J. C.P. 46 at 48; *The Indian Grace (No. 2)* (1998) 1 Lloyd's Rep. 1. See further comments at paragraph 3.24 of MEESON, Nigel, KIMBALL, John. *Admiralty Jurisdiction and Practice*, *5th Edition*, London: LLP, 2017.

without the *in rem* attribute of maritime liens, creditors protected by such security would lose their current privileged status.

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