

Bring the vessel to court: The unique feature of the action in rem in the admiralty law proceedings

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ABSTRACT

Admiralty law, one of the oldest fields of law, has developed distinctive and unique features that distinguish it from other fields. One of these characteristics originates from the commencement of litigation, where a claim can be initiated through two different routes. On the one hand, by the action in personam, where a claim is issued and served on the person/company liable for the damages suffered. On the other hand, the action in rem is a unique action only obtainable under the Admiralty Jurisdiction of the High Court and it is an action against the “res”, ship or ships of named or unnamed defendants. Before the decision of the House of Lords in the *Indian Grace (No. 2)*, it was clear that the action in rem was an action with a number of particular features and that it was separate from an action in personam. Nevertheless, in the case of the *Indian Grace No. 2*, Lord Steyn states that an action in rem and an action in personam are the same thing from the beginning of the litigation. It is submitted that Lord Steyn’s controversial statement, especially in not considering the maritime lien relevant to the matter, has radically reformulated the nature of the action in rem and that – “for some” – its reasons for so doing do not justify the reformulation.

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[http://dx.doi.org/
10.5339/irl.2013.7](http://dx.doi.org/10.5339/irl.2013.7)

Submitted: 8 November 2012
Accepted: 4 July 2013
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Prior to her launching she is mere congeries of wood and iron – an ordinary piece of personal property . . . In 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 name.

(*Tucker v. Alexandroff*, 183 U.S. 424, 438, 1902)

INTRODUCTION

In the United Kingdom the Admiralty jurisdiction may be exercised *in personam* or *in rem*. The exercise of *in personam* jurisdiction does not raise any irregular difficulties since an Admiralty claim *in personam* is essentially no different to a claim in the Commercial Court or in the Queen's Bench Division. However, the distinctive and most imperative feature litigation in the Admiralty Court is the ability in certain cases and in certain circumstances to bring an Admiralty claim *in rem*. Having been regarded as entirely independent from the action *in personam*, the action *in rem* is the action against the ship, or, more appropriately against other properties such as cargo and freight but most significantly not against its owner.¹ Jessel M.R. rightly described the action *in rem* as follows:

You may in England and in most countries proceed against the ship. The writ may be issued against the owner, and the owner may never appear and you get your judgment against the ship without a single person being named from the beginning to end. This is an action *in rem*, and it is perfectly well understood that the judgment is against the ship.²

This article aims to analyze the concept of the Action *in rem* in the Admiralty proceedings, the evolution of the concept, the theories on which it is based (i.e., personification and procedural) and whether there are grounds for saying that an action *in rem* is a legal fiction, being an action *in personam* dressed up as something else. The last but not the least, how this concept has changed after the decision of the House of Lords in the *Indian Grace No. 2*³ where Lord Steyn stated that the maritime lien could be put to one side.

HISTORICAL DEVELOPMENT OF THE ACTION *IN REM*

The arrest of ships is a legal mechanism that prohibits any one from moving the vessel in order that it can serve as security for a claim.⁴

As suggested by Rutherglen these pre-trial remedies have been traditionally justified by the assumption that most admiralty cases involve international commerce and that most assets in maritime commerce (vessels and cargo) are highly mobile.⁵

However arrest of ships has different rules depending on different jurisdiction. In those maritime common law countries the arrest of ships in an action *in rem* is the basic procedure on which maritime creditors rely for the security of their claim.⁶

As Berlingieri specifies:

In these countries, a vessel could only be arrested in the limited number of cases where claimants are entitled to enforce their claims in a proceeding *in rem* and in addition, only the ship against which the claim is asserted can be arrested.⁷

On the other hand in civil law countries, the action *in rem* does not exist. All actions in the civil law – whether maritime or not – are *in personam*, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe a competent tribunal with jurisdiction over the owner in respect of any claim. An example is French law, where the arrest of a ship is allowed even in respect of non-maritime claims and whether or not the claimant is a secured or unsecured creditor. A vessel may be

¹Christopher Hill, *Lloyd's Practical Shipping Guides, Maritime Law* 100 (6th ed., Informa Law, 2003).

²Sir George Jessel MR, *The City of Mecca* (1881) 6 PD 106.

³*Republic of India v. India Steamship Co. Ltd. (The Indian Grace) (No. 2)* [1998] 1 Lloyd's Rep. 1.

⁴NJJ Gaskell, C Debattista, & RJ Swatton. *Chorley & Giles' Shipping Law* 7 (8th ed., Pearson Education Ltd. 1987).

⁵George Rutherglen, *The Contemporary Justification for Maritime Arrest and Attachment*, 30 Wm. & Mary L. Rev. 541, 542 (1989).

⁶William Tetly, *Arrest, Attachment and Related Maritime Law Procedures* 73 Tul. L. Rev., 1895–1985 (1999).

⁷Francesco Berlingieri, *Berlingieri on Arrest of Ships: A commentary on the 1952 and 1999 Arrest Conventions*, 4 (4th ed., Informa Law 2006).

arrested either for the purpose of immobilising the vessel as security (*Saisie Conservatoire*) or in execution of judgment (*Saisie Execution*) whether or not the claim has any relation to the vessel.⁸ Arrest of ships has also been a topic of intense study by international organizations (i.e., UNCTAD⁹, the IMO¹⁰ and the CMI¹¹) that produced two conventions on the topic: the 1952 Arrest Convention¹² and the 1999 Arrest Convention.¹³

According to Tetley:

there are also some jurisdictions that seem to have taken the best features of both the common law and civil law traditions. (i.e., United States maritime law allows a claimant both the right to arrest a ship in an action *in rem* and the right to a maritime attachment).¹⁴

An action *in rem* is simply a claim against the property¹⁵ – *a res* – rather than against the person. Consequently, the judgment is executed only against the *res* and it is binding against anyone in the world who has an interest in the *res*, even if he is not personally subject to the court's jurisdiction and has taken no part in the proceedings.¹⁶ According to Meeson, it is fundamental to differentiate the categories of *in rem* actions: a) a truly *in rem* claim is brought against the ship irrespective of her present ownership and irrespective of any link with liability *in personam* on the part of the owner of the ship at the time the claim is brought and b) all other maritime claims which may be brought *in rem* but which depend upon establishing a link with liability *in personam* which are also referred to as statutory rights of action *in rem* or *quasi in rem* claims.¹⁷ The reason behind the popularity of *in rem* actions is the fact that it is immensely convenient¹⁸ and has practical advantages over a personal action since for example, it may be complicated to obtain court approval to serve a personal writ of summons outside the jurisdiction of the court which issues the writ.

In order to claim *in personam*, it is necessary for the action to be served in England or there needs to be direct participation during the case proceedings in court.¹⁹ In contrast to an action *in personam*, an action *in rem* is against either the ship or in certain circumstances, against the cargo, the freight or the proceeds of sale.

As can be historically acknowledged, “before 1852 in England at Common Law all actions were by way of proceedings *in personam*.”²⁰

In rem jurisdiction was expanded in 1873–75 by the Supreme Court of Judicature Acts of those years and the right was subsequently crystallised by the Supreme Court of Judicature (Consolidation) Act

⁸Shrikant Hathi & Binita Hathi, *Ship Arrest in India and Admiralty Laws of India* 62 (7th ed., 2012) (available at <http://admiraltypractice.com/chapters/62.htm>) (accessed April 8, 2013).

⁹United Nations Conference on Trade and Development.

¹⁰International Maritime Organization.

¹¹*Comite Maritime Internationale*.

¹²1952 International Convention For the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (May 10, 1952) 439 UNTS 193 / UKTS 47 (1960), Cmnd.1128.

¹³International Convention on Arrest of Ships, 1999 (March 12, 1999) (available at http://treaties.un.org/pages/ViewDetails.aspx?sr%20c=TREATY&mtdsg_no=XII-8&chapter=12&lang=en) (accessed July 13, 2013) Doc. A/CONF.188.6.

C.N.112.2011.TREATIES-2 of 14 March 2011 (Entry into force).

On 14 September 2011 the International Convention on Arrest of Ships 1999 (the 1999 Convention) came into force amongst its ten acceding states, following the accession by the tenth state Albania six months ago. The ten states to which the 1999 Convention applies are as follows: Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. The 1952 Convention remains the dominant convention and is in force in 77 countries.

In the UK, arrest of ships continues to be subject to the Supreme Courts Act 1981.

¹⁴*Supra* n. 6.

¹⁵As recognised in Fletcher Moulton LJ, *The Burns* p. 137, 149 (1907) where “an action in rem in an action against the ship itself”.

¹⁶Trevor Hartley, *The effect of the 1968 Brussels Judgments Convention on admiralty actions in rem* 105 L. Q. R. 640, 641 (1989).

¹⁷David C. Jackson, *Enforcement of Maritime Claims*, 73 (4th ed., LLP 2005).

¹⁸Christopher Hill et al., *Arrest of Ships*, 15 (Lloyd's of London Press, 1985).

¹⁹The leading case in this field is: *Maharane of Badora v. Wildenstein* [1972] 2 All E.R 689 (C.A.) where the plaintiff was a resident of France, and the action was against a French resident who lived in England. The court held that there was no impediment to the claim because direct participation was possible in the English Court.

²⁰*Supra* n. 1 at 88.

1925.²¹ However, it was replaced by the Administration of Justice Act 1956²² which was then overridden by the Supreme Court Act 1981.²³

According to the Supreme Court Act 1981, the *in rem* action is possible in three circumstances in maritime disputes: “first, where a party is proceeding on a proprietary maritime claim, including claims by mortgagees; secondly, where a party is proceeding on a claim giving rise to a maritime lien (or other charge); and thirdly, where a party is proceeding on a general maritime claim.”²⁴

Before analyzing the two theories regarding the nature of an action *in rem*, and how its nature has been altered by the House of Lords decision, it is essential to explain the seven features that characterized the action *in rem* before *The Indian Grace* (No. 2). As S.C. Derrington perfectly explains in fact:

1. If a claim form *in rem* has been issued, the sale of the ship will be ineffective in preventing a proceeding against it.
2. In the absence of statutory permission, an action *in rem* lies only against the vessel in connection with which the claim arises.
3. Once the ship-owner appears and defends the action, then the action will proceed as if it had commenced in personam. This indicates that if the vessel itself appears to be insufficient for the claimant’s claim, the other assets of the owner will be available for the enforcement of the action. Conversely, if the owners do not appear, the claimant is limited to the achievable value of the ship which is available once those whose claims rank in priority have been satisfied.
4. Participation in an *in rem* proceeding is not only for the claimant and the owners of the ship, but also others, such as mortgagees, may intervene in the proceeding in order to assert their own rights.
5. The claimant in an action *in rem* may procure the issue of a warrant of arrest either before or after judgment.
6. Once arrested, the ship may be sold by the court, in which event all outstanding claims that could be brought by action *in rem* against her are transferred to the fund from the sale in court.
7. A cause of action *in rem* might not merge in a judgment *in personam*.²⁵

PERSONIFICATION THEORY VS. PROCEDURAL THEORY

Before the judgement in the case *Indian Grace* No. 2, there were two theories dealing with the concept of the action *in rem*. On the one hand, the personification theory looks at the action *in rem* as an action against “res” (usually the ship) as the defendant, and the action is brought “against a ship irrespective of her present ownership and irrespective of any link with liability *in personam* on the part of the owner of the ship at the time the claim is brought.”²⁶ The doctrine of personification of the ship is fundamental to the United States admiralty practice. However, the United States is virtually alone in its retention of the personification doctrine. The courts in the United States embraced this theory throughout the nineteenth and twentieth centuries despite its shortcomings. Other nations have repudiated it.²⁷

According to the personification theory, the ship is the destination of the claim and it is possible to proceed against the vessel in different claims such as maritime liens, mortgages, claims for forfeiture, “*droits*” of Admiralty and claims to possession.

There are eighteenth century cases stressing the liability of the ship as distinct from the owners.²⁸ For example, this theory appears in *The Bold Buccleugh*,²⁹ where it was held that “the action *in rem*

²¹The Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo 5 c 49).

²²Administration of Justice Act 1956 (c. 46) available at <http://www.legislation.gov.uk/ukpga/Eliz2/4-5/46/contents> (accessed 26 July 2013).

²³Supreme Court Act 1981 available at <http://www.legislation.gov.uk/ukpga/1981/54> (accessed 26 July 2013).

²⁴20(2)(e) of the *Supreme Court Act 1981*. Available at <http://www.legislation.gov.uk/ukpga/1981/54/section/20> (accessed 26 July 2013).

²⁵Sarah Derrington, *The Continuing utility of the action in rem*, 123 L.Q.R. 358 (2007).

²⁶Nigel Meeson, *Admiralty Jurisdiction and Practice*, 75 (3rd ed., Informa Law, 2003).

²⁷Thomas J. Schoenbaum, *Admiralty and Maritime Law* 401 (4th ed., West Publishing Co. 2004).

²⁸See *Johnson v. Shippin* (1704) 1 Salk 35; *Clay v. Sudgrave* (1700) 1 Salk 33; *Wells v. Osman* (1704) 2 Ld Ray 1044 (seaman’s wages); *The Two Friends* (1799) 1 C. Rob 271 (salvage); *Menetone v. Gibbons* (1789) 3 T.R. 267, 270 (bottomry); *Greenway and Barkers Case* (1577) Godb. 260; 3 Black Book of Admiralty 103, 243, 245, 261–263; *Corser v. Husely Comb*. 135 (1688).

²⁹*Hammer v. Bell (The Bold Buccleugh)* 7 Moo PC 267; 13 ER 884 (1851).

comprises a unique form of action that is directed against the ship, and not the ship owner”³⁰ and “in our judgment, a proceeding in rem differs from one in personam, and it follows, that the two suits being in their nature different.” A further more recent example of this theory emerges from *The Broadmayne*³¹ case where the court held that “an action which has been commenced as an action in rem continues until its termination as an action in rem unless it undergoes some alteration in its character by amendment and it is a mistake to say that the action changes its character and ceases to be an action in rem and becomes an action in personam when the owner of the res appears and gives bail.”

On the other hand, the procedural theory asserts that the action *in rem* is only a procedural mechanism to guarantee that the owner of the ship appears in court.³²

Appearance³³ in law, generally described as the coming into court of either of the parties to a suit; in other words, is the formal act by which a defendant submits himself to the jurisdiction of the court. The defendant in an action in the High Court of England enters his appearance to the writ of summons by delivering, either at the central office of the Supreme Court, or a district registry, a written memorandum either giving his solicitor’s name or stating that he defends in person.³⁴ He must also give notice to the plaintiff of his appearance, which ought, according to the time limited by the writ, to be within eight days after service; a defendant may, however, appear any time before judgment.³⁵

As Tetley reports: the action *in rem* in the English admiralty law was derived from a process of arrest of property to compel the appearance of the defendant. The primary purpose of the process was to counteract the defendant’s contumacious refusal to appear before the court and contest the suit brought against him.³⁶

A personal action may be brought against the defendant if he is either present in the country or submits to the jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction.

Otherwise, the ship is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent court.³⁷

In fact, since *The Dictator* 1892,³⁸ the law has been that once the owners enter an appearance there are two parallel actions:

... if the owners do not appear, the action only enforces the lien on the res, but that, when they do, the action in rem not only determines the amount of the liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it.³⁹

The crucial aspect of the Dictator’s statement is further enhanced in *The Gemma*⁴⁰ in that the personal liability of the owners is not inherent in the Admiralty action *in rem* but is added or introduced by the owners when they choose to appear:

... Now, apart from authority, it appears to me that when persons, whose ship has been arrested by the marshal of the Admiralty Court, think fit to appear and fight out their liability before the Court [...] that the persons so appearing, as the defendants have done in the present case, become parties to the action, and thereby become personally liable to pay

³⁰Michael Jonsson, *The statutory right of action in rem*, 78(4) *The Australian Law Journal* 262 (2004).

³¹*The Broadmayne* [1916] P. 64 (C.A.).

³²According to a wider view of this approach, the action *in rem* is procedural from the beginning as it appears in *The Indian Grace* decision.

³³From Lat. *apparere*, to appear.

³⁴The entering of an appearance is regulated by the Rules of the Supreme Court, orders xii. and xiii.

³⁵<http://www.theodora.com/encyclopedia/a2/appearance.html> (accessed March 4, 2013).

³⁶*Supra* n. 6.

³⁷Shrikant Hathi & Binita Hathi, *Ship Arrest in India and Admiralty Laws of India* 35 (7th ed., 2012) (available at <http://admiraltypractice.com/chapters/35.htm> (accessed April 8, 2013)).

³⁸*The Dictator* [1892] at 304.

³⁹*Id.*, at 320.

⁴⁰*The Gemma* [1899] at 285.

whatever in the result may be decreed against them; the action, though originally commenced in rem, becomes a personal action against the defendants upon appearance.⁴¹

Moreover, this consistency of the nature *in rem* and of the effect of an appearance by the owners has been magnified particularly in *The Banco*⁴² where Lord Denning remarkably traced the history of the Admiralty action *in rem* in three short paragraphs before adding the following statement so as to evade the uncertainty of an action *in rem*:

... If the defendant enters an appearance, the action in rem proceeds just as an action in personam. If judgment is entered against the defendant, it can be executed against any of his property within the jurisdiction, 'be it his other ships or any other goods [...] If no appearance is entered, however, the action remains, as it began, an action in rem only, operating only against the ship arrested. If judgment is entered in default of appearance, it can be enforced by sale of the ship, but not against the defendant personally.⁴³

Additionally, Lord Brandon of Oakbrook concurs with this customary view in *The August 8*⁴⁴ case confirming that:

... By the law of England, once a defendant in an Admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an *action in rem* but also as an *action in personam*: *The Gemma*.⁴⁵

As it has been observed, there is a constant stream of authority in English admiralty law, commencing with *The Dictator* which holds that the entry of appearance to defend an action in rem is a submission to the jurisdiction of the court. Afterwards any judgment given is *one*; both against the res and in personam against the person entering appearance where that party is personally liable for the claim. However, although this analysis is derived from the procedural theory it does not conclude that an action in rem is merely a device for getting the owners before the court or that such an action is in substance in personam before appearance. Teare exhibits the idea that this would be difficult to account for the circumstance that a maritime lien can be enforced against an owner who purchased the vessel from the person in personam.⁴⁶ Having noted this intricacy, Lord Atkin stipulates the following:

... on the explanation of the origin of a maritime lien given in *The Dictator* one may perhaps be allowed to wonder how such right avowedly dependent upon the personal liability of the owner could be held to be enforceable against a new owner not in any way personally liable for the collision.⁴⁷

MARITIME LIEN, AN ELEGANT MARITIME INSTITUTION⁴⁸

The maritime lien is probably the most unique aspect of Admiralty Law. It is a concept *sui generis*, but for practical purposes it may be considered as a charge upon maritime property, arising by operation of law and binding the property even in the hands of a *bona fide* purchaser for value and without notice but, which can only be enforced by an Admiralty claim *in rem*.⁴⁹

A deep analysis on the Action *in rem* and how it has been tested by the House of Lords in the famous case of the *Indian Grace No. 2* cannot be carried out without analysing the institution of the maritime lien. The maritime lien is one half of the dual key to English Admiralty jurisdiction – the other being the action *in rem*. The maritime lien attaches to a restricted number of maritime claims as established through judicial doctrine. It is enforceable through arrest and is one of the most powerful security

⁴¹Id., at 291–292. For a contrary argument see *The Burns* [1907] 137, at 148 where Fletcher Moulton LJ is not supportive of the latter two statements.

“The two cases upon which counsel have chiefly relied—*The Dictator* and *The Gemma* appear to me, when closely examined, to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an action in personam. In other words, it is not the institution of the suit that makes it a proceeding in personam, but the appearance of the defendant”.

⁴²*Monte Ulia v. Banco and Others (The Banco)* [1971] at 137.

⁴³Id at 151.

⁴⁴*The August 8* [1983] 2 A.C. 450.

⁴⁵Id at 456.

⁴⁶Nigel Teare, *The Admiralty action in rem and the House of Lords* 1 LMCLQ 33 (1998).

⁴⁷*The Tervaete* [1922] 259, 275.

⁴⁸John O. Honnold, *Ocean Carriers and Cargo; Clarity and Fairness—Hague or Hamburg?* 24 JMLC 77 (1993).

⁴⁹Nigel Meeson & John A. Kimbel, *Admiralty Jurisdiction and Practice* 17 (4th ed., 2011).

interests in English Law. Nowhere in the Supreme Court Act is “maritime lien” defined either by concept or content, but the Act provides: “In any case in which there is a maritime lien or other charge on a ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.”⁵⁰

The category of “maritime lien” in English Law originated in 1851 in *The Bold Buccleugh*: “In English Law *The Bold Buccleugh* is to maritime lien what *Donoughue v. Stevenson* is to negligence.”⁵¹

An admiralty action *in rem* may be brought in order to enforce a maritime lien on a ship. A maritime lien is a claim or privilege upon a ship to be carried into effect by Admiralty process⁵² which is based on the concept that the ship (personified) has itself caused harm, loss or damage to others or to their property and must itself make good that loss. However bizarre this sounds, it is the instrumentality by which its owners or their legal servants do wrong.⁵³ On the contrary, it is of a *sui generis* nature as indicated by the classic definition found in the *Bold Buccleugh*⁵⁴ case:

... a maritime lien is to mean, a claim or privilege upon a thing to be carried into effect by legal process ... that process [being] a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty forces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches ... This claim or privilege 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.⁵⁵

Most significantly, a maritime lien:

... adheres to the ship from the time that the facts happened which gave the maritime lien and then continues binding on the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way, which by law, it may be discharged. It commences and there it continues binding on the ship until it comes to an end.⁵⁶

As it has been observed, there is a constant stream of authority in English admiralty law, commencing with *The Dictator* which holds that the entry of appearance to defend an action *in rem* is a submission to the jurisdiction of the court. Afterwards, any judgment given is one; both against the *res* and *in personam* against the person entering appearance where that party is personally liable for the claim. However, although this analysis is derived from the procedural theory, it does not conclude that an action *in rem* is merely a device for getting the owners before the court, or, that such an action is in substance *in personam* before appearance. Teare exhibits the idea that this would be difficult to account for the circumstance that a maritime lien can be enforced against an owner who purchased the vessel from the person *in personam*.⁵⁷ Having noted this intricacy, Lord Atkin stipulates the following:

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Agreeing on this perceptive, Price appears to wonder whether there is logical view behind this in respect to an innocent third party purchasing the defective property:

... What moreover, is the position when the vessel has been sold to a third party? In such a case the ship, but not the owner, is liable, and it would seem that the transformation of the action in rem into an action in personam *cannot take place*. The truth is that Marsden’s procedural theory of the maritime lien is inconsistent with the fact that it may be enforced after a sale.⁵⁹

⁵⁰Section 21(3) The Supreme Court Act 1981.

⁵¹*Supra* n. 17; See also *The Rock Island Bridge*, 73 US 213 at 215 (1867) where Justice Field said: “The lien and the proceeding *in rem* are, therefore, correlative – where one exists the other can be taken and not otherwise.”

⁵²R.G Marsden, *Two Points in Admiralty Law* 2 LQR 357, 363 (1886).

⁵³*Supra* n. 1 at 2.

⁵⁴*The Bold Buccleugh* (1852) 7 Moo PC 267.

⁵⁵*Id* at 284–285.

⁵⁶*Donald Johnston and others v. John Alexander Black (The “Two Ellens”)* L.R. 4 P.C. 161, 169 (1872).

⁵⁷*Supra* n. 43.

⁵⁸*The Tervaete* [1922] 259, 275.

⁵⁹Griffith Price, *The Law of Maritime Liens* 1 (Sweet & Maxwell, 1940).

Brandon J's powerful judicial statement in *The Monica S* discerns the actualities of the shipping commercial practices as he precisely foresees that shipowners, who would wish to circumvent their liabilities, would only be too brisk to sell their ship (against which a writ *in rem* had been issued), to steer clear of the penalties:

... it seems to me that it would be strange if a statutory right of action *in rem* only became effective, as against a subsequent change of ownership of the res, upon arrest of the res, and yet, by the same statute, as conferred the right of action, arrest was in many cases prohibited.⁶⁰

THE INDIAN GRACE NO. 2

The Indian Grace litigation – six separate decisions including two in the House of Lords – is a long and controversial story.

The dispute started in June 1987 when “She” (*The Indian Grace*) was carrying 850 tonnes of munitions from Sweden to the port of Cochin, India, for delivery to the plaintiffs, the Indian Government. During the course of the voyage, a fire broke out in the hold containing the munitions; the fire was eventually extinguished and the vessel was thus directed into Cherbourg, France. The vessel remained there for a month before recommencing the voyage to India and upon inspection a small part of the munitions cargo had been discarded (51 shells worth about £9000).

On 1 September 1988, the plaintiffs issued a claim in Cochin, seeking damages for the jettisoned cargo.

A year later a writ *in rem* was issued in the Admiralty Court in England and served upon the shipowner, arresting the sister ship (*The Indian Indurance*). The statement of claim was that the cargo had been damaged by heat, so as to become of less or no value.

In the first decision of the Admiralty Court,⁶¹ Sheen J. allowed the owners to amend their defense to rely upon section 34 of the Civil Jurisdiction and Judgments Act 1982. Section 34 provides as follows:

“No proceedings may be brought by a person in England and Wales . . . 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 of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales . . .”

The plaintiffs appealed. The Court of Appeal dismissed the appeal⁶² ruling that the causes of action were the same and that section 34 applied. The plaintiffs sought to argue that the owners were debarred by agreement, waiver or estoppel from relying on section 34. The Court of Appeal held that section 34 defined the jurisdiction of the court and that parties cannot by agreement, waiver or estoppel confer a jurisdiction upon the court which it did not have. The plaintiffs appealed to the House of Lords:⁶³ Lord Goff observed that the plaintiffs sought to raise for the first time in the House of Lords the argument that the judgment of the Cochin Court was not a judgment between the same parties as the plaintiffs asserted in the Admiralty action, because it was a judgment *in personam*, whereas the action in the Admiralty Court was *in rem*.

This matter was remitted for the consideration of the Admiralty Judge.⁶⁴

The Admiralty Judge, Mr. Justice Clarke, ordered preliminary issues to be tried. After a six day trial he gave a detailed and careful judgment. He ruled that:

- i. the owners were estopped from relying upon section 34 by an estoppel by convention and an estoppel by acquiescence;
- ii. in any event, the English action being an Admiralty action *in rem*, although an action brought on the same cause of action as the Cochin action, was an action brought against a different party viz the ship rather than the owners; and
- iii. that the principle laid down in *Henderson v. Henderson*⁶⁵ did not prevent the plaintiffs bringing *in rem* proceedings in the Admiralty court:

⁶⁰Id at 772.

⁶¹*Republic of India and Another v. India Steamship Co. Ltd.* [1990] Q.B.

⁶²*The Indian Grace* [1992] Lloyds Rep. 124.

⁶³*Republic of India and Another v. India Steamship Co. Ltd.* [1993] A.C. 410.

⁶⁴*The Indian Grace No 2.* [1994] 2 Lloyds L.R. 321.

⁶⁵(1843) Hare 100.

These three points were in favour of the plaintiffs. The owners appealed. The Court of Appeal came to a contrary conclusion on all three issues and allowed the appeal.⁶⁶

THE DECISION OF THE HOUSE OF LORDS

On 16 October 1997, in his judgment, Lord Steyn expressed these words:

... the role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. Fortunately, the scaffolding can usually be removed with ease: The idea that a ship can be a defendant in legal proceeding was always a fiction. But before the Judicature Acts his 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 which I have described. The fiction was discarded.⁶⁷

With this statement, The House of Lords referred to an action *in rem* as an action against the owner, and not against the vessel. This happens when the owner appears in the court to protect their interests (i.e., procedural theory). However, what has changed the entire concept of the action *in rem* is that the House of Lords goes further and declares that “an Admiralty action *in rem* was against the owners, not from the time of appearance, but from the earlier time of service of the writ *in rem*.”⁶⁸ The House of Lords took a big step in recognising reality in analysing the action *in rem*. In the view of the House of Lords, an action *in rem* in relation to a ship was in substance an action against the shipowner. Therefore, where a claimant had obtained judgement in a foreign court in respect of a cause of action it could not bring further proceedings as regards further asserted damage involving the same cause of action.⁶⁹ An essential issue in the proceedings in 1997 was whether the action *in rem* was the same cause of action as the action *in personam*. The House held that it was the same and hence prohibited by the statutory provision.

The House held that where on a foreign judgement in an action *in personam* had been given in favour of a part; any further action *in rem* on the same matter was prohibited by section 34 of the Civil Jurisdiction and Judgements Act 1982.⁷⁰ A step towards the eradication of the difference between the action *in rem* and the action *in personam* was taken by the House of Lords in *The Indian Grace No. 2*, by recognising as a fiction, that the then action *in rem* had as its target anything or any person other than those interested in the ship in relation to which it was brought. The House of Lords was unaccountably uncomfortable with the concept that a “maritime lien” (enforced by an action *in rem*) could result in an interest in a ship independent of the liability of a shipowner and enforceable against a purchaser.

The action *in rem* is an action connected essentially with a specified thing. While historically it has been considered as lying against the thing, it must now be accepted as lying against a person having an interest in the thing. However it is seen, it is focused on a thing relevant to the claim. Subject to some English judicial comments to the contrary, although it is aimed at an interested person, the claim is limited to the thing and neither the person who is liable in the claim nor any other assets are subject to liability.

In reviewing the development of the action *in rem*, Lord Steyn referred to the use of “personification” of the ship by the Admiralty Court to protect its jurisdiction, and the increasing dominance of the procedural theory after the Judicature Acts.⁷¹ While generally supporting the procedural approach, Lord Steyn acknowledged that it failed to explain how some maritime liens could be enforced against an owner and bona fide purchaser despite the lack of personal liability of an owner.⁷² However, the matter was left as the case before the House was not concerned with maritime liens. Whatever inconsistencies

⁶⁶*The Indian Grace (No.2)* [1996] 2 Lloyd’s L.R.

⁶⁷*Supra* n. 3.

⁶⁸*Supra* n. 43.

⁶⁹In prior proceedings it had been held by the house that the effect of s.34 was to bar proceedings rather than exclude jurisdiction *Republic of India v. Indian Steamship Co.* [1993] Lloyd’s Rep. 387. Hence, the matter was remitted to consider the operation of s.34 and in particular, whether there was any agreement, waiver or estoppel which could defeat it, and reliance was placed on issue estoppel. The further issue of the identity of causes of action was also raised. The House ruled against the plaintiffs on both issues.

⁷⁰By that provision: “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 judgement has been given in his favour in proceedings between the same parties, or their privies, by a court in another part of the United Kingdom or in a court of an overseas country, unless their judgement is not enforceable or entitled to recognition in England or Wales or, as the case may be, in Northern Ireland.”

⁷¹Including a line of “sovereign immunity” cases holding that in an action *in rem* a sovereign owner is directed impleaded e.g., “*The Cristina*” [1938] A.C. 485, “*The Aruntzaza Mend*” [1939] A.C. 256.

⁷²DR Thomas, *Maritime Liens*, vol. 14, British Shipping Laws (Stevens & Sons, 1980).

there were, did not affect the general conclusion that in reality an action *in rem* was against the owner and the ship. It is that conclusion which is emphasised in the examination of the nature of the action *in rem*.

Having said that, even though the Indian Grace's (No. 2) main issue was not on maritime liens,⁷³ there is an obvious relationship between the action *in rem* and the maritime lien, as the latter must be enforced via the former.⁷⁴ Therefore, it can be argued that the purpose of the maritime lien is to compel the owner to appear and once this is done, there is no more need for the lien. In this sense, it can be seen that the action is not against the res, contradicting the very fact that a true *in rem* claim is a claim against the ship herself and not against the owners.

Could it be argued that the Indian Grace undermines the principle found in *The Monica S*⁷⁵ as to what is the position of the bona fide purchaser? The long-standing principle has been that by the issue of the *in rem* proceeding, a statutory right *in rem* irrevocably accrues on the ship and the ship can be arrested, even if she has subsequently been transferred to a bona fide purchaser without notice.⁷⁶

As a result, the principle of *The Monica S* has been indeed undermined especially after the Indian Grace (No. 2) decision since, it has been decided that from the time of service of the proceedings, the *in rem* action is not against the ship, as a defendant, while the personification theory has been discarded.⁷⁷ However, it must be taken into account that due to the fact that the *Monica S* preceded the Indian Grace (No. 2), it is only logical to conclude that until another decision determines this issue, the ruling in the Indian Grace (No. 2) should be limited to the issue of section 34 CJA 1982.

In discussing the role of fiction in the development of the law, Lord Steyn said that the:

... idea that a ship can be a defendant in legal proceedings was always a fiction.⁷⁸ Therefore immediately rejecting the fact that the ship can be seen as a judicial entity in itself.

Cremean does not seem to favour much of Lord Steyn's views having regard to the historical authority on this matter and proposes accordingly [that] it should not be followed.⁷⁹ On the other hand though, Davenport implies that.

... the decision is one which will be welcomed by many because *the fiction* was always difficult to understand, if not faintly absurd.⁸⁰

CONCLUSION

At this juncture, and after scrutinising the principles that define an action *in rem* and an action *in personam* and the two theories underlying them, together with the controversial judgment of the House of Lords and their reasons, an answer to the question below may now be provided.

Is an action *in rem* a legal fiction being an action *in personam* dressed up as something else?

It can be argued that an action *in rem* is a different action from one *in personam*. Traditionally, it has always been possible to bring a court case *in rem* against the vessel, e.g., salvage or collision where a ship could be involved and in most cases in countries with different jurisdictions. Thus maritime claims differ from non-maritime claims. As such, the Admiralty Court provides for action against the ship itself, because if it were only possible *in personam*, then many of the situations arising in maritime disputes would be impossible to resolve due to the problem of there being no connection between parties from different jurisdictions. As previously said, this was one of the disadvantages of the action *in personam*.

Nevertheless, apart from a merely historical standpoint, the most significant *raison d'être* from which an inference may be drawn is that Admiralty law includes the concept of Maritime Lien.

On close examination, *The Indian Grace (No. 2)* case, which provided for many other decisions based on procedural theory, held that "... this case is not concerned with maritime liens. That is a separate

⁷³*Supra* n. 3; "But this case is *not* concerned with maritime liens. That is a separate and complex subject which I put to one side" (Lord Steyn).

⁷⁴Jeremy Browne, *The Extinction of Maritime Liens* LMCLQ 361, 364 (2003).

⁷⁵*The Monica S* [1968] 741.

⁷⁶*Id* at 768–769.

⁷⁷Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* 69 (2nd ed., Routledge-Cavendish, 2007).

⁷⁸*Id* at page 10.

⁷⁹Damien Cremean, *Demise of Proceedings in Rem Outside Maritime Liens?* 39 HKLJ 217 (2009).

⁸⁰Brian J. Davenport, Case Comment: End of Admiralty belief 114 LQR 169 (1998).

and complex subject which I put to one side.”⁸¹ In this decision, The House of Lords, as previously said, does not consider the difference between an action *in personam* and an action *in rem*.

There are situations where, if the procedural theory is supported, it is extremely difficult to resolve the case in dispute. In this regard, Lord Steyn maintained that “. . . the procedural theory of the Admiralty action in rem stripped away the form and revealed that in substance the owners were part to an action in rem.”⁸² It is not too difficult here to see that procedural theory does not enable the maritime lien to follow the ship when it is purchased, nor does this theory explain “the arrest of any vessel owned by the person liable *in personam*, and not merely the vessel in connection with which the claim had arisen.”⁸³ Besides failing to respond to these situations, there is no answer to what happens to those people or companies, (e.g., mortgagees) that are not liable to the plaintiff but have direct interests in the ship. All these situations could have been solved if it had been held that an action *in rem* is an action against the vessel and not the owners.

In last analysis, the author is of the opinion that the decision in the *Indian Grace* (No. 2), does not seem to justify the advancement of reasons held by the House of Lords, agreeing with Teare who decisively states that the: . . . Reassessment [*fails*] to account for the striking characteristic of an Admiralty action in rem whereby a maritime lien or statutory right of action in rem is enforceable after a change of ownership.⁸⁴

In addition to this, the author agrees with the opinion that the *Indian Grace* No. 2 decision was shocking⁸⁵ as it overturned a century of understanding the orthodox analysis of an action *in rem*.

For the moment, *The Indian Grace* (No. 2) stands as binding authority in England, but it is not binding authority anywhere else. Decisions from outside English borders have criticised the decision of the House of Lords in the *Indian Grace* (No. 2)⁸⁶ as indicated in the case of *The Comandate*⁸⁷ in which Allsop J held that:

. . . the law of Australia is that the action *in rem*, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise charterer of the ship.⁸⁸

Moreover, the same Court underlines:

“. . . the capacity of the action in rem to continue against the lien owner if a sale occurred after the commencement of the action.”⁸⁹

The Indian Grace (No. 2) has subsequently been distinguished in New Zealand in the case of *Raukura Moana Fisheries Ltd*⁹⁰ as well as in Singapore in the case of *Kuo Fen Ching*.⁹¹

Even more recently, the South African Supreme Court in *The Allina II*⁹² case, confirmed and agreed with former English admiralty decisions on the fundamental aspect of the action *in rem* thus proving once again that such a conventional decision cannot be discarded without an extensive evaluation of its origin:

. . . These conflicting approaches resulted in a considerable debate in the heads of argument and before us about the true nature of the action in rem in South African admiralty procedure; the application in this country of what was said to be the principle laid down in *The Dictator*; and the impact of admiralty rule 8(3) on that decision, so far as our admiralty law is concerned.⁹³

⁸¹*Supra* n. 3.

⁸²*Supra* n. 43.

⁸³*Id.*

⁸⁴*Supra* n. 43.

⁸⁵*Id.* at 37.

⁸⁶See for example, the New Zealand cases of *The Irina Zharkikh* and *The Ksenia Zharkikh* [2001] 2 Lloyd's Rep. 319 where Young J did not approve of the decision in the *Indian Grace* (No. 2).

⁸⁷*Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* (“*The Comandate*”) [2006] FCAFC 192.

⁸⁸*Id.* at 128.

⁸⁹Sara Derrington, *The continuing utility of the action in rem* 123 L.Q.R. (2007).

⁹⁰*Raukura Moana Fisheries Ltd v. The Ship Irina Zharkikh* [2001] NZLR 801.

⁹¹*Kuo Fen Ching v. Dauphin Offshore Engineering & Trading Pte Ltd* [1995] 3 SLR 721.

⁹²*Transnet Ltd v. The Owner of mv Allina II* (“*The Allina II*”) [2011] ZASCA 219.

⁹³*Id.* at para. 8; See also Angus Stewart, *Characteristics of the Admiralty action in rem: The Allina II* 25 A & NZ Mar. LJ 237 (2011).

In the *Alina II*, the Court had the opportunity of questioning the applicability of the reasoning of Lord Steyn in *The Indian Grace* on the nature of the admiralty action *in rem* as courts in New Zealand, Australia and Singapore have done before. However, the South African court as reported by Angus Stewart avoided the controversy by deciding the case on a narrower basis.

Highlighting the difficulties which flow from the decision in the *Indian Grace* (No. 2) and seeking to clarify the true nature of the admiralty action *in rem*, it can be concluded that the House of Lords judgment has evidently gone against the novel principle of admiralty's distinctive feature. The decision in the *Indian Grace* (No. 2) will need to be confined to the narrow context in which it arose⁹⁴ or the danger is diminishing its practical and necessary function in international maritime commerce and without which many situations would remain outside the law.

⁹⁴*Id* at 361.