[IN THE COLONIAL COURT OF ADMIRALTY OF CEYLON]

1961 *Present :* **H. N. G. Fernando, J.**

THE GOVERNMENT OF THE UNITED STATES OF AMERICA *v.* THE SHIP "VALIANT ENTERPRISE"

Application No. 12 of 1960

An Action *in rem* for Repatriation

Colonial Court of Admiralty of Ceylon—Limits of its jurisdiction—Applicability of English law—Maritime lien attaching to a ship—Action in rem—Right of a foreign State to make a claim based on maritime lien or some other right or lien—Subrogation in relation to maritime lien—Ceylon Courts of Admiralty Ordinance, No. 2 of 1891 (Cap. 7), s. 2—Civil Law Ordinance (Cap. 66), s. 2—Merchant Shipping Acts (English) of 1889, s. 1, of 1894, s. 167, and of 1906 ss. 40, 41, 42—Admiralty Court Acts (English) of 1840, s. 3, and of 1861, s. 11—Administration of Justice Act (English) of 1956, s. 1—United States (of America) Code, Title 46, s. 678.

When an action *in rem* is brought by a foreign claimant in the Colonial Court of Admiralty of Ceylon under the Ceylon Courts of Admiralty Ordinance of 1891 (Cap. 7) in respect of a ship, the Court, in determining whether there exists a maritime lien attaching to the ship, will apply the *lex fori*, the English law, and will give effect to the lien only on the basis that the admiralty jurisdiction of the Supreme Court of Ceylon is restricted to the jurisdiction which the High Court of Admiralty exercised in England at the time when the English Colonial Courts of Admiralty Act of 1890 came into operation. On the other hand, if the claim is, not that the claimant has such a maritime lien, but that he enjoys some other right or lien conferred by some other relevant law of a foreign State, the Court would refer to that foreign law and would decide whether or not to grant a remedy, only after ascertaining whether the right is indeed conferred by the foreign law and if so whether a remedy is available in English law to enforce rights of the same nature.

The plaintiff (The Government of the United States of America), claiming a sum of Rs. 76,222 as expenses incurred in the repatriation of the crew of a ship of United States Registry abandoned by the owners at the port of Colombo, moved the Colonial Court of Admiralty of Ceylon in an action *in rem* by writ of summons which was served on the ship together with the warrant of arrest. The action was for the sale of the ship and for recovery of the sum of Rs. 76,222 out of the proceeds of sale. The plaintiff averred that the arrangements for repatriation of the crew of the ship were made by the plaintiff through the United States Embassy at Colombo in accordance with the provisions of the United States Code, section 678 of which provides as follows :—

"It shall be the duty of the consul and vice-consuls, from time to time, to provide for the seamen of the United States who may be found within their districts, respectively sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give . . . ."

2——J. N. R 930—2,033 (1/62)

Held, (i) that, prior to the passing of the Colonial Courts of Admiralty Act of 1890, the general maritime law as administered in the High Court in its Admiralty jurisdiction in England, which is the *lex fori* to be administered in Ceylon, did not recognize any maritime lien attaching to a ship in respect of a claim of the nature preferred by the plaintiff in the present action for the recovery of the expenses of repatriation. Accordingly, the plaintiff's claim must fail.

(ii) that it could not be contended that the plaintiff stood in the shoes of the seamen themselves or that English law, because it recognizes maritime lien for expenses of repatriation, will enforce the same lien upon the principle of subrogation in an action brought by a person who in fact has incurred the expenses of repatriation. The English Admiralty Court does not recognize the principle of subrogation in relation to maritime liens.

(iii) that even if, prior to 1890, English Law recognized liens or charges arising out of claims for payments of wages or repatriation expenses made under the statute law of the flag, and in respect of which a charge was created by that law, such claims were not regarded as arising upon maritime liens enforceable by actions *in rem*.

(iv) that neither the text books nor the precedents mentioned by an expert witness in his evidence in the present case established the proposition that under American law the United States Government would have a maritime lien or any other charge enforceable by action *in rem* for the recovery of expenses incurred in pursuance of the statutory duty imposed by Title 46 of the United States Code. Hence even if it be correct that the Court in Ceylon must apply the United States law in ascertaining whether or not the plaintiff had a maritime lien, or even if it be correct that the Court must enforce a charge arising under the common law of the United States, it was not proved in the present action that the plaintiff was entitled to any maritime lien or charge.

ACTION *in rem* instituted by the Government of the United States of America against the s.s. " Valiant Enterprise " (or the proceeds of the ship if sold) lying in the Port of Colombo.

H. W. Jayewardene, Q.C., with *N. Nadarasa, K. Kandasamy, C. P. Fernando* and *D. S. Wijewardene*, for the Plaintiff.

G. G. Ponnambalam, Q.C., with *C. Ranganathan, V. K. Palasuntheram* and *R. L. Jayasuriya*, for Messrs. Gill Amin Steamship Co. Ltd., and Papain Products Ltd. defendants.

S. J. Kadirgamar, with *K. Viknarajah, R. Illayperuma* and *Sinha Basnayake*, for Capt. Metzger, defendant.

Cur. adv. vult.

June 30, 1961. H. N. G. FERNANDO, J.—

The S. S. " Valiant Enterprise " of United States Registry arrived outside the Port of Colombo on 10th February 1960. According to certain documents marked by Plaintiff's counsel, the authenticity and correctness

of which, though not expressly conceded by the Defence, I assume for the purposes of this judgment, the master on 11th February informed the United States consular authority in Ceylon that he was short of supplies and fuel and of funds to pay Port dues for entry into the Harbour. The master also lodged with the authority a Protest stating that the owners had failed to pay the wages of the crew and to provide funds for supplies and fuel, and he further surrendered the Ship's papers to the Embassy. After consultation with the State Department, which apparently failed to get any response to its communications to the owners, passage for the crew to the United States was arranged on a chartered aircraft, which also carried the crew of another ship similarly stranded in Singapore. The crew were removed from Colombo and the costs of the charter of the aircraft was defrayed by the United States Government, half of the charter payment being in respect of this crew. These and certain minor expenses are claimed to have amounted to Rs. 76,222.

On 23rd September 1960, the United States Government moved this Court in an action *in rem* by writ of summons which was served on the Ship on the 24th of September together with the warrant of arrest. The action was for the sale of the Ship and for recovery of the sum of Rs. 76,222 out of the proceeds of sale. No appearance was entered by the owners, but appearance was entered on behalf of the master and three other parties who are now Defendants.

In the pleadings filed in the action, the Plaintiff, the United States Government, averred some of the facts stated above and further averred :—

" 8. The arrangements for repatriation of the crew of the said Ship were made by the Plaintiff-Petitioner through the United States Embassy at Colombo in accordance with the provisions of the United States Code, section 678 of which provides as follows :—

' *46 United States Code*

678. Subsistence to destitute seamen ; return to United States.

It shall be the duty of the consul and vice-consuls, from time to time to provide for the seamen of the United States who may be found within their districts, respectively sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities. '

" 9. As the provisions of the above statute obliged the American Embassy at Colombo to repatriate any and all destitute American seamen, it was essential on the part of the Plaintiff-Petitioner to make the necessary financial provision for repatriation."

In paragraph 10 the Plaintiff submitted that " its claim is based on a maritime lien ".

During the course of the argument before me counsel for the Plaintiff referred to certain matters, which, if proved, may have been a basis for the contention that the repatriation expenses had been incurred at the express or implied request of the master, and I informed counsel at that stage that I could take no notice of such matters. The " maritime lien " claimed in the Plaintiff's pleadings was alleged to have arisen by reason of repatriation effected in pursuance of a duty imposed by statute law and not in pursuance of a request from the master ; in the exercise of my discretion, I did not think it reasonable that at so late a stage the Plaintiff should be permitted to rely on a different " cause of action " depending on facts not averred in the pleadings.

Apart from denying the right of the Plaintiff to institute this action, the master has answered that he was entitled to his wages and to reimbursement for certain disbursements made on account of the Ship aggregating to about Rs. 166,000 and found himself without funds, means or wherewithal to maintain the Ship and to maintain himself, and that the owners took no heed of his communications. He also pleaded that in February 1960 he instituted proceedings No. 3 of 1960 in this Court for relief but that the Chief Justice declined to issue a writ of summons. The master further pleaded that he was entitled in respect of his claim against the Ship to a preferred maritime lien and entitled also in the circumstances to sell the Ship, which he had in fact sold in the exercise of the alleged exercise of that right to Papain Products, Ltd., as nominee of the Gill Amin Steamship Co., Ltd., for a sum of £ 14,000, the larger part of which still remained unpaid because of the arrest of the Ship in the present action. In addition this Defendant counterclaimed for damages on account of the alleged unlawful arrest of the Ship by the Plaintiff. The other Defendants, Papain Products, Ltd., and Gill Amin Steamship Co., Ltd., filed Answer much to the same effect and also counterclaimed for damages and made certain alternative claims against the Ship to which for present purposes reference is not now necessary.

Counsel for the Plaintiff, after stating his case, made certain general submissions, including *inter alia* the following :—

(*a*) that the United States Law does not create a maritime lien enforceable by action *in rem* in favour of the master of a ship in respect of his unpaid wages ;

(*b*) that a master has no power to sell his ship even in such circumstances as are averred in the Defendant master's Answer ;

(*c*) that in any event United States Law prohibits the sale of a United States ship without the consent of the appropriate authority, and that such consent had not been granted in this case.

On the basis that these propositions could be substantiated by argument and evidence and would lead to the conclusion that none of the Defendants by whom answer has been filed has a status to contest the Plaintiff's action, counsel invited the Court to decide in the first instance the question

whether any Defendant does have that status. This course I declined to adopt for two reasons, firstly, because such a course would not obviate the need for the Court to determine whether it has jurisdiction to entertain the Plaintiff's action, and secondly, because this being an action *in rem* and one in which the Defendants (who *prima facie* appear to have an interest in the Ship) have raised the question of jurisdiction, it would be of advantage to the Court to have the assistance of counsel for the Defendants in determining that question. Even if the Defendants had no *right* to be heard, the special circumstances of this action rendered it desirable that I hear their counsel at least as *amici curiae.* This question of jurisdiction was accordingly taken up for determination in the first instance.

The arguments urged against the exercise of jurisdiction in this action, or such of them as appear directly pertinent, have been :—

(1) that under the general maritime law as administered in the High Court in its Admiralty jurisdiction in England, which is the *lex fori* to be administered by this Court, there is no maritime lien in respect of a claim of the nature preferred by the Plaintiff in this action ;

(2) that even if this Court is to apply the law of the United States for the purpose of determining whether the Plaintiff holds a lien or charge over the Ship enforceable by action *in rem*, then, *either*
(*a*) United States Law does not confer such a lien or charge on the Plaintiff ;

or (*b*) any such lien or charge as United States Law may confer on the Plaintiff upon the principle of subrogation will not be enforced by the High Court, which does not recognise that principle ;

or (*c*) this Court has no jurisdiction to enforce any such charge or lien except in proceedings in which the Ship is duly under arrest in an action instituted by some other claimant.

In regard to the first of these arguments, reference was made to the absence from the United States Code of any express provision imposing any charge upon a merchant ship in respect of " repatriation " expenses incurred by the United States Government under section 678, Title 46 of The Code or even imposing on the Ship's owners the liability to repay such expenses. On the other hand, the English law contains express provision for the recovery of such expenses incurred by or on behalf of the Government of the United Kingdom.

The Merchant Shipping Act of 1906, having in sections 40 and 41 provided for the maintenance and the sending to a proper return port of distressed seamen, proceeds in section 42 to declare that the expenses

incurred by or on behalf of the Crown on account of a distressed seaman shall be a charge upon the ship and a debt due to the Crown from the master or the owner of the ship for the time being. It is relevant to notice that the Merchant Shipping Act of 1854 which was in operation as at 1890 contained similar provision in section *CCV* of that Act, whereby when a consular officer or any other person defrayed the costs of subsistence and passage home of a seaman in specified circumstances the expenses so incurred were charged upon the ship and upon the owner for the time being. The section declared that such expenses could be recovered as a debt due to Her Majesty either by ordinary process of law or in the manner in which seamen are enabled in the Act to recover their wages.

The fact of the enactment of statutory provision for the recovery of repatriation expenses by the imposition of a charge on a ship in favour of the Crown so long ago as 1854, when sources of jurisdiction in Admiralty were largely unwritten and not statutory, is a strong indication that the Court of Admiralty had not previously recognised the existence of a maritime lien for the recovery of such expenses. The fact (which will presently appear) that corresponding statute law was enacted in Italy, indicates that a maritime lien of such a nature was probably unknown to the general maritime law of another ancient maritime State. In these circumstances, it is surprising to find that the claim of the Government of the United States to such a lien is not based upon the statute law of that country.

Numerous decisions of the English Courts were cited by counsel on both sides, before considering which it seems to me of fundamental importance to decide firstly the scope of the jurisdiction which this Court enjoys under the empowering statute which is the Ceylon Courts of Admiralty Ordinance, No. 2 of 1891 (Cap. 7), section 2 of which is as follows :—

" It is hereby declared that the Supreme Court of the Island of Ceylon shall be a Colonial Court of Admiralty, and such Court shall have jurisdiction, subject to the provisions and limitations contained in the Colonial Courts of Admiralty Act, 1890, over the like places, persons, matters and things as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any Statute or otherwise, and such Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations ".

The limits of the jurisdiction of a Colonial Court of Admiralty established in pursuance of legislation corresponding to the Ceylon Courts of Admiralty Ordinance, No. 2 of 1891, were judicially defined by the Privy

Council in the case of *The " Yuri Maru "* [1], which decided that section 2 of the Colonial Courts of Admiralty Act of 1890 (the " parent " statute of our Ordinance) limits the jurisdiction of the Colonial Court to the admiralty jurisdiction of the High Court of England *as it existed at the passing of the Act.* It was held accordingly that the extension of the admiralty jurisdiction of the High Court by English legislation of 1920 and 1925 does not apply to a Colonial Court of Admiralty. Even if the decision in *The Yuri Maru* [1], not being one on appeal from a Ceylon Court, does not bind me, I see no reason which would justify disregard of it. Nor can I agree that the provisions of the Civil Law Ordinance of Ceylon (Cap. 66) render the Privy Council decision inapplicable. For the purposes of the present context the relevant provision of the Civil Law Ordinance is :

> " 2. The law to be hereafter administered in this Island in respect of all contracts or questions arising within the same relating to ships and to the property therein, and to the owners thereof, the behaviour of the master and mariners, and their respective rights, duties and liabilities,........ and generally to all maritime matters, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period, "

That provision only means in my opinion that this Court must administer the *substantive law* which would at the given time be administered in maritime matters by the High Court, provided of course that this Court has *aliunde* the jurisdiction to entertain a suit in respect of the particular matter involved. I am satisfied that the jurisdiction of this Court is, as stated in *The Yuri Maru* [1], only that jurisdiction which the High Court of Admiralty exercised at the time of the passing of the Colonial Courts of Admiralty Act of 1890.

The basis of the Plaintiff's action is that the Plaintiff, having been " obliged " by section 678 of Title 46 of the United States Code to repatriate the seamen formerly serving on " The Valiant Enterprise ", has a maritime lien attaching to the Ship for the recovery of the expenses of repatriation. At an early stage of the argument counsel desired to lead evidence in order to prove that under United States Law the maritime lien enjoyed by seamen in respect of their *viaticum* enured to the Plaintiff by subrogation and could be enforced as such because the Plaintiff thereby " stands in the shoes " of the seamen themselves. I did not at that stage permit the evidence to be led, for it seemed to me that a British Court of Admiralty, whose practice this Court must follow, would not apply the law of the flag for the purpose of determining whether or not a plaintiff has a maritime lien enforceable by an action *in rem.*

In *Dicey's " Conflict of Laws "* (*7th Ed. p. 1101*), the law is stated as follows :

[1] *Snia Viscosa Societa Nazionale Industria Applicazioni Viscosa v. The Ship ' Yuri Maru', 1927 A. C. 906 ; 43 T. L. R. 698 ; 17 Asp. M. L. C. 322.*

" Questions of priorities are, in some cases, governed by the *lex fori*, which, in this connection, has two functions. First, it must determine the nature of the foreign claim. Thus in an English Court the question whether a creditor has a maritime lien must be decided in accordance with English law. Where the foreign transaction which is alleged to give rise to the lien of a type with which the English law is familiar, no difficulty arises in the application of this principle. But where the foreign transaction is one with which English law is not familiar, regard must be had to its proper law in order to see what rights arise out of the transaction under that law: the court then decides whether those rights amount to what, according to English notions, is a maritime lien. Having determined the nature of the foreign claim, the *lex fori* next determines its rank."

The correctness of these propositions is in my view established byEnglish case law. In *The Milford* [1], an action in which the master of an American ship sued in an English court for wages, the owners appeared under protest and pleaded that by the American law the master of an American ship has no lien upon, or right of action against, the freight for wages earned as master. Dr. Lushington, after stating that the subject had been discussed in another case some time earlier and that he had taken the matter into full consideration, applied the *lex fori* for the purposes of determining whether the maritime lien existed and held that the relevant law applicable was the general maritime law as formerly used in the court and as modified and extended by statute. Having referred to the earlier English law, which disentitled a master from suing for wages in an admiralty court, Dr. Lushington decided that section 191 of the Merchant Shipping Act of 1854, which gave the master the same rights and remedies for the recovery of his wages as seamen have, applies even to a foreign ship and its master suing within British jurisdiction. Despite therefore the averment that the American law conferred no maritime lien for a master's wages, the court held that such a lien was conferred by English law and could be enforced accordingly.

In *The Tagus* [2], where the master of an Argentine vessel made a claim for wages and disbursements, Phillimore, J. held himself bound unquestionably by the decision in *The Milford* [1] to hold that a master of a foreign ship suing in an English court has as good a maritime lien for his wages as has the master of an English ship. He adverted to the difficulty of construction of the language and the content of the relevant provision of the Merchant Shipping Act; it does seem, having regard to the terms of section 191 of the Merchant Shipping Act of 1854 and of the corresponding section of the existing English statute, that the conclusion that the section does apply in the case of a foreign ship can only be reached with difficulty, and that the question whether the section applied might, as Phillimore, J. himself observed, have received a different answer if it were

[1] *The Milford. (1858) 166 English Reports, 1167.*

[2] *The Tagus, (1903) Probate, 44 ; 87 L. T. 598 ; 9 Asp. M. L. C. 371.*

res integra. But neither in *The Tagus*[1] nor in *Reg. v. Stewart*[2], where a similar difficulty arose as to the construction of another provision of the Merchant Shipping Law, was doubt expressed as to the correctness of Dr. Lushington's opinion that the *lex fori* applies in order to determine whether a claimant has a maritime lien.

These cases were considered by the English Court of Appeal in *The Colorado*[3]. There the claimants were a company which had supplied necessaries to the ship and the Credit Maritime Fluvial as mortgagees under a French deed of mortgage. The court entertained evidence as to the French law governing the mortgage, which Hill, J. accepted as establishing that under French law the mortgagee had a *ius in rem* involving a right to proceed by legal process for the seizure and sale of the ship, a right travelling with the *res* into whosesoever hands it may come. He also held that under French law the claim of a necessaries man had priority over the claim of a mortgagee. This priority the Court of Appeal did not recognise, for the reason that questions of priority must be decided according to the *lex fori*. In the judgments delivered in the Court of Appeal, it was pointed out that the right which a mortgagee enjoyed under French law, namely, a right to have the ship seized and the proceeds applied to payment of the mortgage debt was a right closely resembling a maritime lien and would be enforced as such by the English law in accordance with its own order of priorities. It is useful to cite *in extenso* the following paragraph from the judgment of Atkin, L.J. :

> " When an action *in rem* has been brought in these courts in respect of a ship, the court by its decree controls the money which represents the *res* as a result of sale or bail, and directs payment to be made to such claimants as prove their claim in the order of priority directed by the court. To give the necessary directions the court may have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the *res* at all. For instance, the claimant may claim a right of property in the ship granted to him abroad. The court must examine the *lex loci contractus*—I assume for argument's sake this to be relevant law—to see whether any right of property is so given, and the nature of it. A claimant claims as an English necessaries man ; his right is only to have the court award him a particular remedy. He has no right to the ship or the proceeds independent of the remedy. A claimant claims as possessing a maritime lien. This might appear to be an intermediate case as a maritime lien does give a right against the ship, which continues notwithstanding a change of ownership. Nevertheless in determining whether there exists a maritime lien, the court will apply the *lex fori*, and will give effect to the lien as it exists by English law: (*see the case of The Tagus: The Milford.*)."

[1] *The Tagus, (1903) Probate, 44 ; 87 L. T. 598 ; 9 Asp. M. L. C. 371.*

[2] *Reg. v. Stewart, 80 L. T. Reps. 660 ; (1899) 1 Q. B. 964 ; 8 Asp. M. L. C. 534.*

[3] *The Colorado, (1923) Probate, 102 ; 128 L. T. Rep. 759 ; 16 Asp. M. L. C. 145.*

In my understanding of the English Law as thus explained a distinction is here drawn between two types of foreign claims. If the claimant seeks to establish a right of property in a ship granted to him abroad, the court must examine the *lex loci contractus* " to see whether such right of property is so given and the nature of it ". If there is such a right and it is one of a nature known to English law, that remedy afforded in the English court will be granted to the same extent and subject to the same order of priorities as would apply in relation to the corresponding right arising under English law. But if the claim is that a maritime lien exists, that is to say, the right *in rem* attaching to a ship known to the general maritime law, then the question whether the maritime lien exists has to be answered by reference to the *lex fori*, namely the English law. As pointed out in Phillimore, J's judgment in *The Tagus* [1], English law for this purpose means, not only the common law as originally applied in the court of admiralty, but also that law as altered by English statutes. To put the matter in a simple form, I can well imagine a Judge sitting in Admiralty in England, a country whose mariners, merchants and lawyers had much to do with the formation and development of the Law of the commerce of the sea, saying to a claimant averring that he had a maritime lien known to that Law : " The courts of this country recognise the maritime liens known to that Law and apply that Law and that Law as this court knows it will be applied in order to determine whether you have or have not such a maritime lien ". On the other hand, if the claim is, not that the claimant has such a maritime lien, but that he enjoys some other right conferred by some other relevant law of a foreign State, one can equally well understand that an English court would refer to that foreign law and would decide whether or not to grant a remedy, only after ascertaining whether the right claimed was indeed conferred by the foreign law and if so whether the English court knew of a remedy available to enforce rights of the same nature.

Before passing from this line of cases I should refer at this stage to *The Livietta* [2], to which reference may again become necessary in another connection. There had been a consolidated action of salvage against the Italian brig " Livietta " in which the claims of the salvors against the brig had been paid out of the proceeds of the sale of the brig, and a balance of some £60 remained in court thereafter. The solicitors who had appeared for the Defendants in the salvage action applied to the court for payment of this balance in satisfaction of their costs. The crew of the brig had been repatriated to Italy at the expense of the Italian Government, which opposed the solicitors' application on the ground that the Government was entitled to a lien upon the proceeds in court in respect of the repatriation expenses. It was proved that, by Italian statute law, the repatriation expenses incurred by agents of the Italian Government are chargeable against the ship and also that

[1] *The Tagus, (1903) Probate, 44 ; 87 L. T. 598 ; 9 Asp. M. L. C. 371.*

[2] *The Livietta, (1883) 8 P. D. 209 ; 49 L. T. Rep. 411 ; 5 Asp. M. L. C. 151.*

priorities to the proceeds of sale are privileged in the following order : the expenses of sale, the expenses of salvage, and out of the residue " the keep of the captain and crew, indemnity for their return to their country, and wages of the said crew, etc. ".

The solicitors relied on provision in an English statute of general application which enabled the court to declare an attorney or solicitor employed in a suit entitled to a charge for his costs and expenses upon the property recovered or preserved in the suit. In rejecting their claims, the court held that the section was not intended to give a solicitor priority over claims giving a lien which could have been enforced in a suit by other persons against the property which was the subject of litigation ; and accordingly the claim of the Italian Government was given priority. But in recognising the claim of the Italian Government Sir James Hannen did not anywhere refer to that claim as being one arising upon a *maritime lien.* Having referred to the similarity between the provisions of the Italian statute law by which the repatriation expenses incurred by the Government were chargeable upon the ship and to the corresponding statutory charge imposed upon a ship for repatriation expenses incurred by British consular officers, the judgment proceeds to recognise the charge created by the Italian law and thereafter to state that the charge " must be looked upon as a part of the terms upon which seamen were engaged for the voyage ". There is little room for doubt that the Italian Government's claim in *The Livietta* [1] was treated as one falling within the second category of claims which I have mentioned above with reference to the judgment of Atkin, L.J. in *The Colorado* [2], that is to say, not a claim of a maritime lien, but a claim of some other right or lien granted by foreign law. Having ascertained the existence and the nature of the right claimed, the court allowed the Italian Government the corresponding remedy available under the English law for a right of the same nature. On this aspect of the matter it seems to me that the decision in *The Livietta* [1] is not merely reconcilable but is in perfect accord with the general statement of Atkin, L.J.

The Plaintiff in the present case has claimed a maritime lien enforceable by action *in rem* on the basis that such a lien is granted by the law of the United States to the Government of that country for expenses of repatriation incurred under the section of the United States Code to which I have already referred. The Plaintiff's pleadings did not aver that the *lex fori*, the English law, recognises that a foreign government has a maritime lien, under general maritime law, for the recovery of expenses incurred in the repatriation of seamen to the foreign country from a British port. I do not consider that this omission in the pleadings should debar the Plaintiff from succeeding in this action if indeed the English law does recognise the existence of a maritime lien in such circumstances. What in fact counsel for the Plaintiff has contended for in this connection

[1] *The Livietta, (1883) 8 P. D. 209 ; 49 L. T. Rep. 411 ; 5 Asp. M. L. C. 151.*

[2] *The Colorado, (1923) Probate, 102 ; 128 L. T. Rep. 759 ; 16 Asp. M. L. C. 145.*

is that the English law, having first recognised as a basic right a seaman's maritime lien for his wages and for expenses of repatriation, will enforce the same lien upon the principle of subrogation in an action brought by a person who in fact has incurred the expenses of repatriation. Except however, for one English case to which I will presently refer, none of the numerous judgments of the English Admiralty Court to which counsel on both sides have drawn my attention contains even any mention of this theory of subrogation in relation to maritime liens. The claims in which the courts recognised rights in respect of the supply of necessaries to ships and the payment of wages of a master or seaman appear to me to fall into four classes. *Firstly,* those in which a master or seaman has directly preferred claims against the ship or against proceeds of sale for the recovery of sums due as wages. *Secondly,* claims preferred by masters for disbursements made by them in payment of wages or in payment for necessaries required for the ship. *Thirdly,* claims made directly against the ship by persons who have themselves supplied the necessaries. *Fourthly,* claims by persons who made advances intended to be applied, and in fact applied, for any of the purposes enumerated in the preceding items. In regard to these claims, the English courts invariably recognised the seaman's lien for his wages and with one exception (the decision in *The Sara* [1], subsequently set at nought by an Act of 1889) invariably recognised the master's lien for his wages and disbursements. In regard to necessaries it is now settled law that the supply of necessaries creates no lien, but only a right to arrest the ship and thereby render the ship from that stage chargeable for the debt. (*The Henrich Bjorn*[2].) For present purposes it is not necessary for me to discuss these recognised claims of the first three classes which I have enumerated above; but what have to be considered with care are the claims falling within the fourth class, which perhaps may appropriately be described as claims where persons, other than masters of a ship or suppliers of necessaries, have been able to recover in actions in admiralty moneys provided as wages to seamen or masters or moneys provided to masters for the purpose of the procurement of necessaries or of making privileged payments or of moneys paid for necessaries supplied, and thus to ascertain if possible upon what principle recovery is allowed in such cases. *Roscoe,* in his " *Admiralty Practice* " (*5th Ed. p. 207*) says :

> " A person who pays for necessaries supplied to the ship, has against the ship and her owners as good a claim as the person who actually supplied them, and he who advances money to the person who thus pays for the purpose of thus enabling him to pay stands in the same position as the person to whom the money is advanced."

[1] *The Sara, (1889) 14 App. Cas. 209 ; 61 L. T. Rep. 26 ; 6 Asp. M. L. C. 413.*

[2] *Northcote v. Owners of The Henrich Bjorn, (H L.). (1886) 11 App. Cas. 270 ; 55 L. T. Rep. 66 ; 6 Asp. M. L. C. 1.*

In *The William F. Safford*[1] the ship was arrested on 8th December 1859 and sold in an action of necessaries and the proceeds were paid into the Registry. Thereafter on 15th March 1860 judgment was pronounced in favour of a claimant under a bond of bottomry. On the same day an action of necessaries was entered on behalf of one Da Costa for wages paid by him in November 1859 to the crew by directions of the master. One dispute was upon the question whether the holders of the bottomry bond should have preference over Da Costa's claim and on this matter Dr. Lushington pronounced as follows :

> " A bond is entitled to precedence over all other claims except wages, or a subsequent bond or salvage claim. Seamen's wages, however, come first of all, according to the established practice of the court ; and I am of opinion that Da Costa's claim is in the nature of wages, and must therefore be the first paid. If he had not advanced the money, the seamen would have no doubt arrested the ship, and enforced their right to priority of payment. I shall therefore direct Da Costa's claim to be satisfied first, and next the bondholders."

The payment by Da Costa to the crew was therefore not regarded merely as a payment for necessaries but one in the nature of wages. Although however the point is not mentioned in the judgment what seems to be important for the present purposes is that Da Costa's claim was that he had made the payment " by directions of the master on account of the ship ".

In *The Andalina*[2] the proceeds of sale of the ship in an action for necessaries were in the custody of the Admiralty Division of the High Court. In consequence, a wages action by the seamen in which they had recovered judgment in a County Court, as well as a necessaries action in which one Meek had also obtained judgment in the County Court for sums paid by him for light dues and towage, were both transferred to the High Court. In regard to his payment for towage it was contended that this was in the nature of salvage and should therefore have priority over the seamen's claim. This contention Butt, J. did not accept and he emphasised that the seamen's claim and their lien were unquestionable. Plaintiff's counsel in the present action strongly relied on this decision as one which emphasised the fundamental importance of a seaman's maritime lien ; but I do not find it of assistance in considering what right if any is enjoyed by a person who makes a payment out of Court in satisfaction of seamen's wages.

In *The Lyons*[3], the same plaintiff instituted two mortgage actions against a ship which was sold by order of the court. Subsequently an action *in rem* was instituted by one Lafone to recover sums of money paid by him for equipment and repairs as well as for wages, pilotage and

[1] *The William F. Safford, (1860) 2 L. T. Rep. 301.*

[2] *The Andalina, (1886) 12 P. D. 1 ; 56 L. T. Rep. 171 ; 6 Asp. M. L. C. 62.*

[3] *The Lyons, (1887) 57 L. T. Rep. 818 ; 6 Asp. M. L. C. 199.*

towage. Lafone opposed the payment of the sale proceeds to the mortgagee on the ground generally that by agreement with the owners he had undertaken the wharf arrangements of the vessel, engaged a captain and crew for a voyage to and from Antwerp, and had paid all outgoings including wages. The question was whether this payment for wages should take precedence of the mortgage claims for the reason that "the wages item is in the nature of a wages claim and is entitled to the same priority". Butt, J. during the course of the arguments observed that Lafone should have obtained permission of court before making the payment and held in his judgment that the contention that Lafone was entitled to precedence in respect of the wages " is a strong proposition which I cannot accept ". Counsel for Lafone had relied on *The William F. Safford*[1]. But if both cases were correctly decided (as I assume they were) the distinction seems to be that, in *The William F. Safford*[1], the claim did not arise after some arrangement with the owners justifying the inference that there was reliance on the credit of the owners and not of the ship, but instead was based upon a payment of wages at the instance of a master enjoying implied authority to pledge the credit of the ship.

The distinction just mentioned is referred to in *The Orienta*[2]. By agreement with the owners of " The Orienta " certain claimants in this case had supplied coal to the ship upon terms previously arranged, namely payment by Captain's draft drawn in favour of the Firm upon the owner. Two bills of exchange thus drawn were accepted but not paid by the owners. The Firm contended that they were entitled to a maritime lien for the price of the coal supplied. The President of the Court first considered the provisions of section (1) of the Merchant Shipping Act of 1889 which was enacted to confer on the master a maritime lien for the recovery of disbursements properly made by him on account of the ship and then inquired what the criterion was to determine what disbursements and liabilities of the master for a ship can give rise to a maritime lien. " I am not aware " he said " of any authority which shows that the captain was ever supposed to be able to create a maritime lien upon the ship except when within the general scope of his authority he could have pledged the owner's credit ". The case before him he held to be merely one where the master had issued the bills in pursuance of express authority and of a prior agreement to that effect between the owners and the suppliers. In this view a creditor could claim a maritime lien *only if the owner's credit was pledged by virtue of implied general authority* and not of any express authority.

In *The Ripon City*[3], the master brought an action *in rem* against the owners to recover moneys alleged to be due for wages and for liabilities incurred by him for coal supplied to the ship. The coal had been purchased at Beunos Aires and La Plata and in each case the master had

[1] *William F. Safford, (1860) 2 L. T. Rep. 301.*
[2] *The Orienta, (1895) P. 49 ; 71 L. T. Rep. 711 ; 7 Asp. M. L. C. 529.*
[3] *The Ripon City, (1898) P. 78 ; 78 L. T. 296 ; 8 Asp. M. L. C. 391.*

drawn a bill upon the owners in favour of the suppliers. The bills were accepted but dishonoured. It was held that the liabilities incurred by the master were incurred on account of the ship and that a master had a maritime lien under section 167 of the Merchant Shipping Act of 1894 for those liabilities. The case of *The Orienta* [1] was distinguished on the ground that unlike in that case the master had obtained the coal in the ordinary course of his employment as master and by so doing pledged the credit of the owners. The following observations of Barnes J. are of much assistance in ascertaining the principle upon which the act of a master can create a lien in favour of another :

> " The result of my examination of these principles and authorities is as follows : The law recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, master's wages disbursements and liabilities and damage. According to the definition above given, such a 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. *This right must therefore in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner.*"

The principle appears to be that the master himself can only claim a maritime lien for a liability incurred purely in pursuance of his implied general authority to pledge the owner's credit for certain purposes. It would follow that, if some " third party " may claim a maritime lien in connection with such a liability he may do so on the basis of a supply or payment to the master which if made by the master himself would have given rise to a lien.

Of much interest is the judgment of Hill J. in *The Petone* [2], in which many of the earlier decisions were carefully considered. I do not find it necessary to examine the facts of this case and am content to reproduce some of the citations and observations of the learned Judge. He cites thus from the judgment of Dr. Lushington in the early case of *The New Eagle* [3] : " When I first read the papers on which this motion was to be founded I felt a strong disposition to support the claim of Mr. Brambles, so far as the law would enable me to do it, because the seamen had a right to resort to this court and take the body of the ship as the means of obtaining payment of their wages ; but the law of this country has always struggled against such claims being allowed. I must be guided by the case of *The Neptune (1834) 3 Hagg. Adm. 129* and I know of n principle recognised by the common law that allows any person, who has made advances on account of a ship, unless it be bottomry, to come here and

[1] *The Orienta, (1895) P. 49 ; 71 L. T. Rep. 711 ; 7 Asp. M. L. C. 529.*

[2] *The Petone, (1917) Probate 198 ; 14 Asp. M. L. C. 283.*

[3] *The New Eagle, (1846) 4 Notes of Cass. 426.*

make a claim ". He referred to the practice of the admiralty court whereby, once the *res* is under arrest, the court could on application made on behalf of persons interested in the *res* as bondholders or otherwise for leave to pay off the crew, allow such leave on terms that persons so paid would be entitled to recover in the same order of priority as the crew themselves. Hill, J. thereafter observes: "Notwithstanding *The W. F. Safford*[1], it must, I think, be taken that the considered opinion of Dr. Lushington was that no one had a right to pay off wages and claim against the ship. Upon whatever ground of convenience the bondholder or other person was allowed to pay off wages and claim against the ship, the fact that the leave of the court was necessary is quite inconsistent with any doctrine that he who pays off wages stands in the shoes of and has the maritime lien of the seamen. If that right existed, Dr. Lushington's warning was an empty threat ". In the view of Hill, J. "the weight of authority is strongly against the doctrine that the man who had paid off the privileged claimant stands in the shoes of the privileged claimant and has a lien, whether it be regarded as a general doctrine or as applied to wages only ". This view of Hill, J. is directly and heavily opposed to the argument of counsel before me that, because the United States Government provided for the crew of " The Valiant Enterprise " the means of repatriation which it was the owner's duty to provide, the Government now enjoys the same maritime lien as the crew could have enforced against the ship.

The *Petone* judgment is the only one brought to my notice in which there is even any mention of the doctrine of subrogation. Such mention was first made in the argument of counsel for the plaintiff in that case, where he said that " the doctrine stated by Phillimore, J. in *The Tagus*[2] is merely an application of the principle of subrogation ", referring it would seem to this passage in the judgment from *The Tagus*[2] :

> " I follow in that respect the decision in *The Albion*, which has been cited to me, and I think that is the law, but if the whole disbursements are, as apparently they are (they will have to be looked into if necessary) merely payments of wages of the crew, who might have seized the ship, then I think the doctrine which this court has often applied— that the man who has paid off the privileged claimant is standing in the shoes of the privileged claimant—should be applied, and I think the master has a lien for any disbursements made, although he was not master, in payment of the wages of the crew."

Counsel for the Plaintiff in the present action relies equally strongly on that same passage for his contention that the English courts of admiralty do recognise the principle of subrogation.

I myself am quite unable to take these remarks of Phillimore, J. as purporting to be anything but a statement of the law applicable in the

[1] *The William F. Safford, (1960) 2 L. T. Rep. 301.*

[2] *The Tagus, (1903) Probate, 44 ; 87 L. T. 598 ; 9 Asp. M. L .C. 371.*

context of the case before him. The master of " The Tagus " had undoubtedly paid the wages of the crew ; but he did so of necessity and and in the interests of the owners and of the ship, in that but for such payment the crew might either have refused to serve or have caused the ship to be arrested, any of which events would have terminated the voyage. Having regard to the earlier decisions such as *The Ripon City*[1] it seems to me that Phillimore, J. was merely deciding that, upon the facts before him, the master of " The Tagus " in paying the wages of the seamen was acting in the course of his implied general authority to pledge the credit of the ship in the interests of the continuance of the ship's voyage. His action in so doing was of benefit both to the ship and to the owners, a fact which in Phillimore, J.'s opinion justified the application of the doctrine that persons paying off a privileged claim would stand in the shoes of those claimants themselves and therefore themselves have the same maritime lien.

With reference to the invocation of the principle of subrogation Hill, J. said in *The Petone* [2] " I know of no principle of English law which says that one who being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays ". What counsel for the Plaintiff has argued before me is that, in terms of this dictum of Hill, J., the United States Government having incurred the expenditure of repatriation under the United States statutory law, is not a volunteer, and therefore must be held to have inherited the seamen's maritime lien. But this argument ignores the reference in the dictum " being under no compulsion and under no necessity to protect his own property ". It ignores also the fact that in *The Tagus* [3] the master first satisfied the court that the payments which he made were made both under necessity to protect his own interests as well as the interest of the ship for both those interests would have been prejudiced by a frustration of the voyage. It does not in my opinion suffice for a claimant to say that because he paid off a privileged lien holder and was not a volunteer, he therefore holds the lien. In order that he may " stand in the shoes " of the lien holder in the sense in which I understand Phillimore, J. to have used that expression, he must further satisfy the court affirmatively that his intervention was made on the faith of the credit of the ship and that but for his intervention the interests of the ship and of its owners would have been seriously prejudiced.

Counsel for the Plaintiff himself relied on the practice referred to in many decisions of the English courts whereby after arrest of a ship some person interested will be permitted to pay expenses of repatriation and thereafter to rank in priority in place of the repatriated men. He

[1] *The Ripon City, (1898) P. 78 ; 78 L. T. 296 ; Asp. M. L. C. 391.*

[2] *The Petone, (1917) Probate 198 ; 14 Asp. M. L. C. 283.*

[3] *The Tagus, (1903) Probate, 44 ; 87 L. T. 598 ; 9 Asp. M. L. C. 371.*

argued that this practice was an application of the principle of subrogation. It seems to me that the answer to this contention is to be found again in the judgment of Hill, J., where he refers to the 1822 order of Lord Stowell in *The Kammerhevie Rosenkrants* [1] where an application on behalf of bondholders was granted to permit them " to pay off the wages of the crew, in order to save the expense arising from their detention on board, and to decree that they should be reimbursed their advances out of the proceeds of the ship, prior to the satisfaction of any other claim thereon ". I myself do not find any need to rely upon any special doctrine of law in support of the proposition that, once a ship is under arrest and a privileged seamen's claim for wages or for *viaticum* is asserted and acknowledged, the court has the power to permit some party to pay off that claim on the understanding that the court will afford to him who pays the claim that same priority which the seamen themselves could have asserted.

The decision of the admiralty court of New Zealand in *The Zita* [2] at first sight does support the Plaintiff for the last sentence in the judgment reads " The plaintiff in this case is not a volunteer, and upon the authorities I think he is entitled to the benefit of the master's statutory lien in respect of his claim for advances, wages and necessaries ". But if I can assume the head note to be correct, the advance was made at the request of the master, and in any event it is stated at the commencement of the judgment that " If the action of the master requires ratification it has been ratified by the owners who have acknowledged the claim and repeatedly promised payment ". Although there is no reference to the point in the judgment, I am surely justified in assuming that the plaintiff in *The Zita* [2] was not merely not a volunteer, but a person who to use the language of the *Petone* judgment was either under compulsion or under necessity to protect his own property, or else a person without whose assistance the voyage of " The Zita " would have been frustrated. Even if the Scottish case of *Clark v. Powring & Co.* [3], (the report of which is not available to me) correctly decided that a lien for seamen's wages can be assigned, the pleadings in the case before me do not raise the question whether the maritime lien of the crew of " The Valiant Enterprise " was assigned to the Plaintiff in this action.

There have been many cases in which a person advancing moneys for the purpose of the purchase of supply of necessaries to a ship has been able to recover the debt by action *in rem* against the ship. Dr. Lushington in his judgment in *The Alexander* [4] observed that section 6 of the Act of 1840 " conferred upon this court the jurisdiction in these matters or rather perhaps revived an ancient jurisdiction long prohibited ", and that the statute was intended to " give a new remedy which was

[1] *Kammerhevie Rosenkrants, (1822) 1 Hagg. Adm. 62.*

[2] *Rhind v. ' The Zita ', New Zealand L. R. (1923) p. 369.*

[3] *Clerk v. Powring & Co., (1907-8) Sess. Cas. 1168.*

[4] *The Alexander, (1842) 166 English Reports, 602.*

rendered necessary in the peculiar cases of foreign ships ". He said also that the condition imposed by this section upon the court is " that the common law must not make the owners of a foreign ship liable for the supply of any articles on which under similar circumstances if resident here they would not be responsible in a court of common law. I believe that upon this subject there is no real distinction between that law and the law maritime ". He accordingly ascertained the legal acceptation of the term " necessaries " by reference to earlier cases in which actions relating to necessaries were decided under the common law and relied upon a statement in *Abbott's* treatise on Shipping " that in order to constitute a demand against the owners it is necessary that the supplies furnished by the master's orders should be reasonably fit and proper for the occasion or that moneys advanced for that purpose should at the time appear to be wanting for that purpose", and also upon the statement of Lord Ellenborough " in strictness a claim of this kind is limited to articles supplied through necessity but where the same necessity exists money may be supplied as well as goods and the amount recovered ".

What is important for present purposes is to note that in actions in admiralty decided quite soon after the enactment of the Act of 1840 the English courts did not regard the person advancing money for the supply of necessaries as thereby standing in the shoes of the necessaries man himself and succeeding to his right, but instead applied the former common law principle that in certain circumstances the provision of the money gave the same actionable right as did the supply of the necessaries.

The observations of Hill, J. in the much more recent case of *The Mogileff*[1] makes it clear that the English courts continued to regard the matter in the same light: " It is well settled that *moneys advanced for the procuring of necessaries stood on the same footing as necessaries supplied* ". There is here no invocation of any principle of subrogation as being the basis of the claim made by a person advancing money for the purchase or supply of necessaries. Equally it seems to me that the English courts in recognising a claim by a person, whether a master or some other, paying off the wages of a crew, in order to prevent their arrest of the ship and thus to facilitate the continuance of a voyage, were not relying on any principle of subrogation but were rather recognising a direct right accruing by reason of the advance.

I have lastly to consider the decision of the Ceylon Court of Vice Admiralty (?) reported in *1 Browne's Reports. p. 202.* The ship " Fleur de Lotus " had apparently been sold by order of court upon a judgment obtained by a Company which had towed the ship to Ceylon from Singapore and the court thereafter considered the order of priority of various claims. In so doing it was decided that " claims for payment of subsistence and the return passages of seamen must rank with the claims for wages of seamen ". The report indicates that passage money had been

[1] *Mogileff, (1921) Probate 236 at page 241 ; 15 Asp. M. L. C. 476.*

paid both by the Ceylon Government and by other interested persons, and the judgment certainly decided that claims on this account would have priority over the claim for towage. But the facts as reported are not of much assistance to me, for it is not clear whether the ship was of British or foreign registry or whether the disbursements for passages were made with or without a request in that behalf by the master.

In so far as the High Court of Admiralty did prior to 1890 recognise a lien or charge arising by reason of the " payment off " of wages or repatriation expenses, claims allowed by the decisions appear to be of three classes :—

(1) claims for payments made of necessity on the credit of the ship or at the request of the master ;

(2) claims for payments made, after the arrest of the ship, with the prior authority of the court ;

(3) claims for payments made under the statute law of the flag, and in respect of which a charge is created by that law.

Even if the present claim is by analogy within the third class, the decisions do not establish that the High Court recognised such claims as arising upon maritime liens enforceable by actions *in rem*.

Relying on *The Livietta* [1], where the court recognised and enforced a charge on a vessel created by Italian statute law in favour of the Government for the recovery of expenses of repatriation of a crew, counsel for the Plaintiff invited me to hold that, just as much as a statutory foreign charge conferring a right *in rem* against a vessel was thus enforced, equally this court should enforce a charge which according to counsel's argument United States Law, although not statutory, imposes upon a ship for the recovery of repatriation expenses incurred in pursuance of section 678 of Title 46 of the United States Code. The question whether the United States Law does indeed impose such a charge is dealt with later in this judgment. But at this point I am concerned only with the question *whether this court has jurisdiction to order the arrest and sale of a foreign ship at the instance of a plaintiff who asserts right alleged to arise upon such a foreign non-statutory charge.*

I have therefore to decide whether the High Court of Admiralty in England would as at 1890 have had the jurisdiction to enforce, by way of arrest and sale of a ship, a charge of such a nature as that on which the Plaintiff bases its claim. For at least two reasons, it is seriously doubtful whether the High Court did have such a jurisdiction. Firstly, it is not without significance that counsel engaged in these proceedings on behalf of the Plaintiff and the Plaintiff's American Advisers have not been able to refer me to any case in the English courts in which an action *in rem* was successfully instituted on the basis of a claim that the right of action

[1] *The Livietta, (1883) 8 P. D. 209 ; 49 L. T. Rep. 411 ; Asp. M. L. C. 151.*

was granted by virtue of the common law of a foreign state. Even the case of *The Livietta* [1] decided in 1883 was one where the foreign Government only asserted its claim to share in the sale proceeds of a ship already arrested and sold at the instance of persons who indisputably held a maritime lien under the general maritime law. That case did not decide that the Italian Government had such a right as would have entitled them to secure from an English court a warrant of arrest against the ship. The doubt arising by reason of the considerations just mentioned becomes the more serious when the provisions of the Admiralty Court Acts of 1840 and 1861 are examined. Section (iii) of the earlier Act provided :

> " After the passing of this Act, whenever any ship or vessel shall be under arrest by process issuing from the said high court of admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court, in either such case the said court shall have full jurisdiction to take cognisance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any claims or causes of action respectively ".

It seems to be clear from this express provision that at that time even a British mortgage of a British ship could not have been enforceable in the court of admiralty except in the case of a ship already arrested and in *custodia legis*. But as to this last mentioned matter the Act of 1861 in section 11 altered the law ; that section, presumably for reasons of convenience, conferred jurisdiction on the High Court of Admiralty in England over any claim in respect of any mortgage duly registered under the Merchant Shipping Act of 1854 whether the ship be under arrest of the court or not. There is no reason why I should not assume that in regard to a claim in respect of some other mortgage, the jurisdiction of the High Court of Admiralty at 1890 was only that which section 3 of the Act of 1840 conferred. As stated in the long title, the purpose of the Act was to improve the practice and *extend the jurisdiction* of the court and when the Legislature in section (iii) gave a jurisdiction over claims in respect of mortgages in the case of a ship already under arrest, the underlying assumption surely was that prior to 1840 the court would not have enjoyed any jurisdiction over a claim in respect of the mortgage of a ship. That being so, it follows *a fortiori* that prior to 1840, the court would not in any circumstances have had jurisdiction over a claim analagous to a claim upon a mortgage alleged to arise under foreign law. When therefore, in the year 1883, the court in *The Livietta* [1] recognised a charge for repatriation expenses attaching to an Italian ship under the statute law of the flag, it seems to me that had the point of jurisdiction been taken by reference to the Acts of 1840 and 1861 (it was not taken in that form) the answer could have been that the claim based upon the foreign statutory charge was analagous to the case of a mortgage and

[1] *The Livietta (1883) 8 P. D. 209 ; 49 L. T. Rep. 411 ; 5 Asp. M. L. C. 151.*

could there ore be entertained because, in terms of section (iii) of the Act of 1840, the proceeds of sale of the ship were then in Court consequent to prior arrest at the suit of the salvors.

I have not consulted in this connection the statute law in England subsequent to 1890 but counsel for the Plaintiff did refer to section 1 of the Administration of Justice Act of 1956 which apparently re-states the admiralty jurisdiction of the High Court as including " (c) any claim in respect of a mortgage or charge of a ship or any share therein ".. The provision is amplified by subsection (4) so as to comprise mortgages and charges created under foreign law. These provisions may well be merely re-statements of other statutory provisions enacted in England after 1890, but whether they be new or else only such a re-statement, what seems important for present purposes is that the High Court now has jurisdiction over charges created by foreign law by virtue of statutory provision enacted after 1890. This is the second ground for my opinion that in all probability the High Court did not enjoy in respect of any such foreign charge any but the restricted jurisdiction conferred by section (iii) of the Act of 1840. That being so this court does not in my opinion have jurisdiction to entertain an action and arrest a ship, if the Plaintiff's claim is based solely upon a charge alleged to arise, not under the general maritime law, but under the national law of the flag.

Although I had indicated at an early stage of the argument that this court would not resort to United States Law for determining whether the Plaintiff held a maritime lien under the general maritime law, evidence as to the United States Law was in fact led in connection with the argument which I have considered and rejected in the paragraphs immediately preceding. A charge, it was claimed, arose in favour of the United States Government when it incurred the expenses of repatriation of the crew. Referring to the *American Corpus Juris, Vol. 60 p. 712–716* it was argued that the doctrine of subrogation applied because the expenses were incurred under legal or moral compulsion.

In the affidavit of Mr. Carl C. Davis filed with the Plaintiff's petition reference is made to about twelve reported decisions of the American courts and there were appended to that affidavit photostat copies of those reports, the authenticity of which counsel for the Defendants acknowledged in advance. Without referring in detail to all the reports I am content to make the general observation that, in nearly every one of them, either the statements of facts or the order of the courts makes it clear that, where money advanced for the purpose of the ship was held to be recoverable, the legal ground of recoverability was that the advance had been made upon the credit of the ship. In three of these reports, *The Ruth E. Merrill* [1] decided in 1922 in appeal by a Circuit Court of Appeals. *The Little Charley* [2] decided in 1929 by the District Court of

[1] *The Ruth E. Merrill, 286 Fed. Rep. 355 (1922).*

[2] *The Little Charley, (1929) 57 F (2d) 319.*

Maryland and the *The Engelwood* [1] decided in 1932 in the District Court of New York there is reference to "subrogation", and it may well be that the legal ground, upon which a person making advances is entitled to a maritime lien as known to American law or otherwise to recover the debt is different in nature to that upon which the English courts recognise similar claims. But the following passages from the judgments show that *the American courts stress the element that the advances should be made upon the credit of the vessel :*

> " It is probably true that Carpenter advanced what he did because he held a mortgage, which was in great danger of being lost in foreign parts. He prevented the equivalent of a marshal's sale abroad and enabled the ship to get home ; the law protects him in so doing. To that extent he rightly acted for his own interest. " (*The Ruth E. Merrill* [2])

> " The mortgagee, however, claims subrogation by virtue of certain advances which the owner made on behalf of the vessel out of the proceeds of the mortgage loan, namely, $825. It is true that advances made to a vessel's owner on the vessel's credit for the purpose of paying, and out of which there is actually paid, maritime claims, entitle the one making such advances to a maritime lien of equal rank with the claims thus satisfied, without regard to an actual necessity for the advances. " (*The Little Charley* [3])

> " The crew had a maritime lien for their wages.................. Those who advanced money to the master to pay crew's wages are entitled to a maritime lien of the same rank. " (*The Engelwood* [1])

Mr. Davis also refers in his evidence to a decision of the District Court of Haifa, Israel, in *The Pacific Wave* [4], where the court sustained a claim of the United States Government for the recovery of expenses incurred in the repatriation of the crew of a ship abandoned by the owners in the port of Haifa, which decision was marked " P. 10a " in this action. But that decision is not in my opinion authority for the proposition that the Haifa court recognised any right of the United States Government to cause a ship to be arrested and sold for the satisfaction of its claim. Mr. Davis admitted that some other party had first instituted an action against the ship for necessaries and the Government's claim was admitted thereafter upon intervention. The decision only establishes the proposition that after arrest such a claim as the Government now sets up was admitted and presumably satisfied out of the proceeds of sale. The decision does not state whether the court was applying either the

[1] *Engelwood, (1932) 31 F (2d) 120.*

[2] *The Ruth E. Merrill, 286 Fed. Rep. 355 (1922).*

[3] *The Little Charley, (1929) 57 F (2nd) 319.*

[4] *Govt. of U. S. A. v. 'The Pacific Wave', D. C. Haifa Maritime Claim No. 14 of 1960.*

general maritime law or the *lex fori* or the United States Law. Still less does it give any indication whether the court recognised that the claim of the United States Government arose upon the principle of subrogation.

Mr. Davis could not point to any decision of any American court holding that where the Government incurred expenditure under section 678 of Title 46 of the United States Code the Government would thereby become entitled to a maritime lien upon the principle of subrogation or upon any other principle. This lack of American precedent Mr. Davis sought to account for by the answer that the question would not normally arise for decision in an American court but would arise only in foreign jurisdictions. He however emphatically insisted that the decision in the District Court of California in Admiralty No. 2714 of July 15, 1960, in the case of *The Liberty Ship " Audrey II "* [1], (a certified copy of the opinion was filed in the affidavit) was one in which an American court did pay out to the United States Government the cost of repatriation of the crew of the ship from Yokohama to the United States. There is simply nothing in the opinion to support Mr. Davis' proposition. What the court there upheld was the right of the Government to recover advances made with the antecedent approval of the court under whose authority the ship was duly under arrest, such approvals being granted in an order expressly stating that the advances so made would constitute a lien on the ship. Even if Mr. Davis correctly stated that certain repatriation expenses were permitted to be recovered, although not incurred under the authority of the court's express order, it may well have been the case that when the court ultimately allowed those expenses to be recovered it only did so in what might be appropriately termed " proceedings in execution " and not in recognition of the Government's right to arrest and proceed against the ship simply in order to recover costs of repatriation.

Mr. Davis also referred to two American decisions not cited in his affidavit. With reference to *The Washington* [2], marked " P. 13 ", decided by the District Court of New York in 1924, it appears from the judgment, and it was ultimately conceded in evidence, that although the court there did recognise the maritime lien of a seaman for his wages, no question in fact arose of any claim upon the principle of subrogation by reason of the paying off of a seaman's claim. In the case of *The Handelfinanz v. Evanthia* [3], " P. 14 ", a ship of Costa Rican Registry had been libelled *in rem* and the proceeds of the sale of the ship were in the Registry of the court which thereafter considered various conflicting claims against the proceeds. For this purpose the court considered and confirmed the Report of a Special Commissioner. One party which was apparently the mortgagee of the ship claimed for moneys paid out as

[1] *U. S. A. v. Liberty Ship Audrey II, et al., in Admiralty No. 27141, U. S. District Court, Northern District of California, South Div.*

[2] *The Washington, 286 Fed. Rep. 158.*

[3] *Handelfinanz v. Evanthia (1955) Am. Maritime Cas. 340.*

wages of the crew and also expenses incurred for repatriation and the Commissioner stated that " under the general maritime law seamen are entitled to repatriation and the costs thereof may properly be allowed as a maritime lien ". This was not a claim by the Costa Rican Government of the same nature as asserted in the present action by the United States Government. On the contrary the cost of repatriation in that case would seem to have been incurred by the mortgagee.

I do not propose to refer to the judgment of the French court, a translation of which was marked " P. 16 " in this action. It was stated on behalf of the Plaintiff that the translation had been made by counsel practising at the bar in Ceylon, but counsel for the Defendants did not concede the authenticity of the translation.

In the result I find that neither the text books nor the precedents mentioned by Mr. Davis in his affidavit and in his evidence established the proposition that under American Law the United States Government would have a maritime lien or any other charge enforceable by action *in rem* for the recovery of expenses incurred in pursuance of the statutory duty imposed by Title 46 of the Code ; and there remains in support of this proposition only Mr. Davis' opinion. The qualifications he relies on as constituting him an expert are two-fold, namely, his experience as an attorney in the Admiralty and Shipping Section of the Department of Justice in the United States and also his part-time activity as a Professor of Admiralty law at two universities at Washington. I feel reluctantly compelled to observe that an employee of the Department of Justice, who according to his own evidence was responsible for advising his Government to prefer other claims of the nature now preferred before me, is not in my opinion a suitable choice as a witness to testify as an expert to what in fact is the American law. Reference is made in *Dicey's " Conflict of Laws " (7th Ed. p. 1112)* to the fact that, when the uncontradicted evidence of an expert witness is " obviously false ", " obscure " or " extravagant ", the court may reject it and form its own conclusion as to the effect of the foreign sources. I certainly would not think of using any such expression with regard to the evidence of the expert in this case ; but as to the correctness of his opinion I am not satisfied for at least two reasons.

Firstly, even if he did not advise the institution of the present action he did in fact advise the preference of two similar claims on other recent occasions : the witness showed in his evidence an understandable tendency to be " interested " in the success of the present action. For instance the witness states at the commencement of his evidence that he had handled numerous cases in the courts of the United States and also in various foreign courts where rights *in rem* were asserted against vessels by the United States in consequence of maritime liens and again the witness said he was also aware of several cases in which the United States Government had recovered *viaticum*. It seems to me that the witness was not

justified in making such statements. Ultimately it was only the case of *The Audrey II* [1] to which he pointed as being an instance where an American court had allowed such a claim by the United States Government; and even in regard to foreign decisions the experience of the witness appears to have been limited to three cases, the Haifa decision in *The Pacific Wave* [2], some case in Saudi Arabia and the decision in a French court which I have mentioned earlier. Answers such as those given to Questions No. ———— to No. ————, which had subsequently to be retracted, at the least indicated a lack of the caution one would ordinarily expect in an expert witness.

Secondly, he invited this court, in his affidavit, to accept several decisions of the United States Courts (reports of which he appended) as establishing his proposition that United States Law recognises a maritime lien to arise upon the facts of the present case; but none of those decisions bear out his personal opinion. Since the grounds he chose to put forward in the affidavit appear to me unsound, I do not feel bound to accept that opinion as correct.

Mr. Davis asserted that the principle of subrogation would operate to confer a charge under the common law of the United States in a case where some Governmental agency in pursuance of a statutory duty " pays off " some debt or liability secured by a lien or charge. I accordingly invited counsel for the Plaintiff to refer to any decision of a United States court recognising such a charge, but no such decision was brought to my notice. As to section 678 of Title 46 itself, the duty it imposes is so clearly referable to considerations of public interest, both of the United States and of the country in which its seamen may be stranded, that it would be unreasonable to infer that the section contemplates that the expenditure it authorises would be incurred on the credit of the vessel concerned. Indeed, such expenditure may well have to be incurred despite the knowledge that the vessel concerned is already a total loss.

Having considered the evidence as to the United States law I am satisfied that the Plaintiff has not proved that under that law a maritime lien or other charge enforceable by action *in rem* arises in its favour. Hence even if it be correct, despite the decisions in the English courts in *The Milford* [3] and *The Colorado* [4], that this court must apply the United States law in ascertaining whether or not the Plaintiff has a maritime lien, or even if it be correct that the decision in *The Livietta* (supra) has the consequence that this court must in this action enforce a charge arising under the common law of the United States, it was not proved in this action that the Plaintiff is entitled to any such maritime lien or charge.

[1] *U. S. A. v. Liberty Ship Andrey II, et al., in Admiralty No. 27141, U. S. District Court, Northern District of California, North Div.*

[2] *Govt. of U. S. A. v. ' The Pacific Wave ', D./C. Haifa Maritime Claim No. 14 of 1960.*

[3] *The Milford, (1858) 166 English Reports, 1167.*

[4] *The Colorado, (1923) Probate, 102 ; 128 L. T. Rep. 759 ; 16 Asp. M. L. C. 145.*

I cannot conclude this judgment without acknowledging my debt to all counsel engaged in this case for the valuable assistance afforded to me in the consideration of questions which have been to us both novel and complex. If the arguments were prolix, and the judgment be prolix in consequence, or if on the other hand some decisive matter has escaped attention, unfamiliarity on the part both of counsel and Judge with the law governing the action should be sufficient excuse.

Plaintiff's claim dismissed.