MARITIME LIENS.[1]

I have chosen the subject of maritime liens, because it exemplifies very well the state of confusion into which many branches of our law have fallen. And I should like to describe what a maritime lien ought to be and what it in fact is, and why it is not what it ought to be.

An ideal description of a maritime lien would, I take it, run something like this, that it is a claim or privilege attaching upon the ship itself, travelling with the ship wherever it goes, and arising, quite independently and irrespectively of ownership or incumbrance, from any set of circumstances which centre in the ship. That description would include matters arising on charterparties and bills of lading, the making of repairs, the supply of necessaries as well as seamen's wages, collisions, salvage, towage and other maritime events. Moreover three consequences would naturally flow from the idea embodied in that description. Firstly, that the lien would attach to the ship quite irrespective of any personal obligation of the person who happened to be owner at the time when the event occurred which gave rise to the lien. Secondly, that the limit of liability must be the value of the ship. And, thirdly, that the lien should remain indelible notwithstanding any change of ownership.

A maritime lien in this form would be highly advantageous to commerce. The shipowner may be domiciled far from the countries which his ships visit: he may be in financial difficulties or even insolvent circumstances: again the state of ownership may be in doubt or dispute, or there may be incumbrances in the shape of mortgages or charterparties. Some or all of this information may be quite unattainable by the man who supplies necessaries or makes repairs, or puts his goods on board for carriage. But if he has a claim or privilege upon the ship itself of the kind described, all this information is immaterial to him. He is secured by the ship.

Unfortunately, hardly any of this description is correct now, though it once upon a time was very nearly so. Matters arising out of charterparties and bills of lading, the supply of necessaries, and the making of repairs, do not create a maritime lien at all. More-

[1] Address by Mr. E. C. Mayers, of the British Columbia Bar, before the Foreign Trade Bureau of the Chamber of Commerce of Vancouver, 17th February, 1928.

over, even when a maritime lien does arise, it does not possess all the attributes which I have mentioned.

Now I want to try and explain how this very unsatisfactory result has come about, and why similarly unsatisfactory results are so common in most other branches of the law.

There are two methods of law-making which are conceivable, and which have in fact at different periods been employed. A legislative body, assisted by a committee of experts, evolves a series of general principles which are to govern human relationship, and deduces from those principles by a logical process the various rules applicable to all the varying classes of transactions which can occur. That is one method. On the other hand a bench of judges can derive from their inner consciousness what they understand to be the common law or the custom of the realm and apply it to the particular set of circumstances which arises for decision. The latter is the way in which our whole body of law has grown up.

Now the disadvantages of this method are those which attach to every form of tradition. Ideas and conceptions which seem quite intelligible and even inevitable to the men of one generation may wear a very strange and unfamiliar aspect to their descendants, and will consequently be wrenched and twisted to suit the moral preconception of that later generation. Moreover the forms which embody these archaic notions will be at the mercy of historical accidents arising from the peculiar circumstances of the people whose laws are thus left in this fluid state.

This is what has in fact happened in the case of maritime liens, and I should like to say a few words on their origin and their history.

Now the origin of the maritime lien is to be found in the metamorphosis of a ship into a juridical entity, which is conceived of as capable of committing wrongs or assuming the obligations of a contract just as a natural person can do. That is part of a very old idea. The ascription of personality to an inanimate object, particularly to an offending inanimate object has its roots in very deep-seated human feelings. Even modern man, when he hits his shin against a chair, has to restrain the impulse to kick the chair; and in early times this instinct found expression in the rule of law which condemned to forfeiture any inanimate object which had, as it was said "moved" to the death of a man. If a beam fell and killed a man, or a wagon crushed a man to death, the beam or the wagon became forfeited to the Crown. This imputation of personality to things of wood or stone must have been particularly easy in the case of a ship, which, espe-

cially, in the case of a ship under sail, certainly appears to be endowed with life.

No doubt this archaic idea was the source of all the maritime liens which appear in the various codes of the sea in the eleventh and twelfth centuries and which were in force all over the Mediterranean and round from Barcelona to the Hanseatic cities. All these codes, with the vivid gift of personification common to all early codes of law, identified the ship as the wrongdoer, who, in the case of collision, had moved to the death or damage of another.

Courts of law in England must have been entirely receptive to this idea. The English law knew the deodand, the inanimate article of wood or stone which was forfeited for the harm it had done; and there would, therefore, be nothing strange in the idea of the ship as an active wrongdoer. Accordingly we find in our earliest text-book writer, Mr. Britton, who wrote his book about 1292, the formal statement that a ship, which had caused death or damage, should be forfeited; an idea which contained the germ of the maritime lien.

The extension of this idea to the realm of contracts was an easy one. Whoever had worked on board a ship or had supplied necessaries to a ship or who had repaired her or lent money for her purposes, had a maritime lien on the ship itself.

This no doubt was the original state of the law in Courts of Admiralty in the fifteenth and sixteenth centuries, but then an unfortunate circumstance occurred. The law of the admiralty was administered in what were known as the King's Courts, that is, courts erected by the royal prerogative, as distinct from the Common Law Courts, which were supposed, quite incorrectly, to derive from an immemorial antiquity. And in the reigns of Elizabeth and James I. a fierce conflict arose between these two sets of courts. The struggle was embodied in the persons of two men, Lord Coke and Lord Bacon. Lord Coke was the head of the Common Law Courts, the Chief Justice of England, and not only a judge but a profound lawyer. He was, consequently, an upright and very honest man, for his age, though, maybe, harsh and narrow in his views. Lord Bacon was a very eminent politician and was eventually convicted of taking bribes, and driven from his office of Lord Chancellor. A large part of the lives of these two men was taken up in the attack on and defense of the King's Courts; in which Lord Coke was largely successful, and in the struggle the Admiralty Court suffered heavily. It was shorn of a large part of its jurisdiction and its rules and practice were thrown very greatly into confusion.

Consequently, when, in the nineteenth century, the Court of Admiralty again emerged into prominence, the judges who there administered the Admiralty law were confronted with a welter of confusion, and a number of archaic ideas which they thoroughly misunderstood.

As a result of this confusion and misunderstanding the idea of the maritime lien has undergone strange transformations: it is only the last of the three prime attributes that I have mentioned which has survived the process of distortion which the theory of maritime liens has suffered at the hands of the judges. A maritime lien still remains indelible, notwithstanding any change of ownership. But the value of the ship has ceased to be the limit of liability, and so far forgotten has been the origin and true meaning of the lien that it was possible for a judge to say, in 1893, that, inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability.

It is obvious how fundamental a departure this is from the law as it originally stood and from the idea which underlay it. But not even this is the worst. In the struggle between the two sets of Courts, the Common Law Courts had shorn the Court of Admiralty of its jurisdiction over contracts, over the supply of necessaries, and the doing of repairs. In 1840 and again in 1861 Parliament attempted to restore some of this jurisdiction by conferring on the material man, who had effected repairs or supplied necessaries a right against the ship itself. For some time it was supposed that their maritime liens had been restored to the material men, but the Courts eventually decided that the rights conferred by these Statutes were lower in nature than maritime liens, and gave merely a right of arrest, conditioned on narrower circumstances than the amplitude of the maritime lien.

The result, therefore, stands thus. Many events which ought to give rise to maritime liens and which, in fact, at one time did so, have ceased to do so. The maritime lien has been shorn of its most distinctive features. And, alongside the maritime lien, but inferior to it in advantage, a set of lesser rights of arrest has appeared.

Now it is very obvious that such a state of affairs must be very unsatisfactory. No system of law can work harmoniously which is not founded on intelligible principles, logically applied. The position of maritime liens is only an example of what is to be found in almost every branch of our law. What the law ought to be is clear;

that is, a rule of life which supplies clear guidance in carrying on the business of life. What it actually is, is equally clear to anyone who has observed its workings, namely, a series of painful surprises and disastrous pitfalls.

HOUSE OF LORDS SPEECHES.—No greater contrast can be imagined than the Woolsack manner of Lord Buckmaster and Lord Birkenhead to that of Lord Chancellors Selborne and Cairns. Great actors of noble parts, Lord Cairns and Lord Selborne spoke not from the floor of the House, but as from Sinai, and as interpreters of what should or should not be done, backed by much the same authority.

I heard Lord Cairns make one of the finest speeches ever listened to in the well-listening House of Lords, as I have known it; but the contrast in style and way with the House, as compared to the style and way of the later distinguished occupants of the Woolsack is, in my view, so conspicuous as to be significant—of what I cannot exactly say, but perhaps of the broadening out of our institutions. . . . By the ease of their demeanour, by speaking to us as men of the world, as passengers "in the world's most crowded streets," Lord Buckmaster and Lord Birkenhead have done much to liberate and to cheer the House at large.

LORD RIBBLESDALE in *Impressions and Memories.*