M.L.A. - 4th Annual Convention. - 1977.

(i)

"Frank Stewart Dethridge Memorial Address"

delivered by The Hon. Sir Ninian Stephen, KBE, a Justice of the High Court of Australia

on the 14th October, 1977

on the occasion of the 4th Annual Meeting of The Maritime Law Association of Australia.

The name of your Association conjures up heady imaginings, tall ships and stars to steer them by, the Spice Isles, the coral isles and Greek isles in a wine dark sea.

The actuality is perhaps a trifle less exotic; not all those here today are either swashbuckling, spade-bearded buccaneers, returned from / forays in distant waters, or even learned doctors of the law maritime, with the laws of Oleron in one hand and a ship's sextant in the other. In these prosaic times conventioneering has replaced buccaneering and Bourbon on the rocks at 30,000 feet the goblet of Malmsey wine and the keg of Jamaica rum.

Nevertheless there remains a special flavour to maritime law, it brings into lawyers' lives the musky fragrance of far off lands and the curiosities of systems of law remote from our own.

Your Association's name is a distinguished one. Its ancestor body, with which it is affiliated / is the Comité Maritime International, founded in 1897 and ever since in the forefront of international legislative reform of maritime law. Closely associated with the origin of the Hague Rules after the First World War, it was the Comité which in 1963 formulated the Visby Amendments, later embodied in the protocol of 1968.

Many sea-going nations have maritime law associations affiliated with the Comité and it is appropriate that Australian lawyers/taking and others an active interest in maritime law should have formed your Association. An island nation, Australians are

dependent upon carriage by sea or air for all their overseas trade. The conditions on which that great flow of trade is conducted, the terms upon which the perils to be encountered may be insured against and the means by which the trade is to be financed are all matters vital to the welfare of Australia. The more expertise that can be gained by Australians and put at the service not only of Australian exporters and importers but also of Australian governments and their representatives in negotiations overseas, the greater will be the contribution towards the soundness of our economy and our ability to compete on world markets. On this in turn may depend much of what we have come to recognize as the Australian way of life and the democratic traditions which we cherish.

International trade law, a topic wider than but frequently intersecting with maritime law, is in an exciting evolutionary state and in Australia it has attracted much attention from the Law Council of Australia, from Federal governments and from academics, as well as those practitioners directly involved in its problems. It is well served in local journal literature. This is not, I think, the case with maritime law; yet it is an area of law in which Australian lawyers ought to be much involved.

One particular aspect of it has special significance to Australia. With some 12,000 miles of coastline, a vast territorial sea and a Continental shelf greater in area than that of

perhaps any other nation, the international regimen of off-shore waters, in whatever form it ultimately emerges from the trauma of the conference table and the anarchy of unilateral decree, must be of prime concern to us. While primarily an area for the public lawyer rather than the private practitioner or corporation lawyer, any company concerned in the exploitation of off-shore resources, whether fish in the ocean or oil or minerals under its bed, must be keenly interested in it.

Of course, living as we do in a federal polity, the regimen of our off-shore waters is, for us, complicated by the division of power between central and State governments. Despite the lengthy judgments of the High Court in the Seas and Submerged Lands litigation[1], many problems remain. Superimposed upon the complexities induced by our federal system are curious vestiges of Imperial law, reminding us of our former colonial status and adding to the complexity of the law of our off-shore waters. The Sunday sailor who ventures out of Westernport in a circumnavigation of Phillip Island may not only have left Victorian waters before returning to his moorings for tea but may, according to their Lordships of the Privy Council, in the course of his journey, have momentarily exchanged for the provisions of Victorian and Commonwealth law the sanctions of present day English criminal law. His vessel being a British ship, because owned by a British subject, English law will apply to it and its crew on the high seas.

This was the recent experience of the two fishermen who stole crayfish pots some 22 miles off the Western Australian coast. However much English those two fisherman, Santo and Gaetano Oteri, spoke it was no doubt in the Australian idiom and, as naturalized Australian citizens living in Fremantle and aboard a licensed Western Australian fishing boat, they no doubt put it to good if incoherent use when they discovered that they might be convicted of offences under the British Theft Act of 1968, an Act inapplicable to Scotland or Northern Ireland but applicable in the off-shore waters of distant Australia[2].

At least the Oteris were well and truly on the high seas when they coveted their neighbours' crayfish pots. Chen Yin Ten, the captain of a Taiwanese fishing boat, again off Western Australia, was not so fortunate. His craft was detected rather less than 12 miles off a fragment of land, Rosily Island near Onslow; because it was held to be a true island, capable of supporting the construction of a base line around it and a twelve mile proclaimed fishing zone beyond that base line, then, prone as it might be to disappearing under the waves in cyclonic conditions, it was sufficient to involve Chen in illegal fishing in a proclaimed fishing zone. His boat was forfeit and Chen Yin Ten was fined[3]. Closer still inshore was the prawn boat of Raptis & Son when charged by the South Australian authorities with unauthorized prawning in South Australian waters. They were fishing in

Investigator Strait, protected from the Southern Ocean by the long bulk of Kangaroo Island, which even in 1836 when Hindmarsh and Light founded Adelaide, was already the haunt of fishermen and sealers more intent on their catch than on any observance of the law. A majority of the High Court found that Investigator Strait, unlike South Australia's two great gulfs, St. Vincent and Spencer, was not a part of the inland waters of the State but was instead part of the Commonwealth's territorial sea and Captain Flinders' diary and charts of 1801-2 played a notable part in the argument and in the judgments[4]. Then there was the case of the unfortunate Mr. Bull and others, would-be drug runners, who, having cast their contraband marihuana upon the off-shore waters all too close to Northern Territory shores for their own good, were held to be within the reach of the penal provisions of the Customs Act of the Commonwealth and within the ordinary jurisdiction of the Supreme Court of the Northern Territory[5]; and the case of Mr. Florenca whose undersized crayfish, caught in breach of a State fisheries law, involved him in an offence against that law although the catch was made not in State waters but in the territorial waters of the Commonwealth[6].

I mention these cases, all decided in the past two or three years, to instance the variety of problems in but one area of maritime law with which the Courts have been concerned. The problems all arose out of one or another aspect of the regimen of

off-shore waters, whether concerned with the location of the boundaries of inland waters, of the territorial sea or of other zones of the ocean, with the significance of that distinction for the purposes of State and Federal fisheries or other laws, with the application of Imperial law or with questions of the jurisdiction of Courts to entertain charges under one or more of those laws. Considerations of constitutional law and constitutional history have very much intruded into the picture in most of these cases but essentially they are matters involving the law of the sea, of maritime law.

In more conventional areas of maritime law Australian Courts have also been much involved. One that comes immediately to mind as involving a significant contribution to maritime law is that of the liability of stevedores and their ability to claim the protection of exemption clauses in bills of lading. The decision of the High Court in Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd[7] and in particular the close analysis of the stevedores' position made by Fullagar J. was widely regarded as authoritative in many jurisdictions beyond Australia. It seemed at the time to have concluded the matter. But to think this was to underestimate the ingenuity of carriers and their draftsmen. The so-called Himalaya clause, taking its name from the vessel in question in Adler v. Dickson[8], has, in the hands of their Lordships, in the Privy Council, with inspiration from the shade of the late

Lord Reid in Scruttons v. Midland Silicones[9], opened new avenues for the exemption of stevedores from liability. Their Lordships' decision in The Eurymedon[10], on appeal from New Zealand, may provide in many situations a means of protection for stevedores. That decision has been both lauded and criticised in the journals and with the High Court's new responsibilities as a final court of appeal it remains to be seen whether ultimately the views that there prevailed, the views of a majority of three to two, prevailing over a unanimous New Zealand Court of Appeal, will necessarily provide the law for Australia.

Salvage law is a very pure and rarefied example of maritime law; it represents one of the few remaining excitements of life in the modern merchant navy. The notion of salvage reward carries the promise of the pot of gold at the rainbow's end and under its influence the most cynical seaman will become a character out of a Conrad novel. Just such a case was that romance of the sea delightfully recounted by Macfarlan J. of the New South Wales Supreme Court under the title Societe Maritime Caledonienne v. The Cythera[11]. It began with what may have been piracy but was certainly the felonious taking of the yacht Cythera by two of its crew while its owner was ashore tasting the doubtful pleasures of the R.S.L. Club on Lord Howe Island. It ended with an hilarious naval action between the intrepid captain and crew of the French would-be salvor Colorado

del Mar and the hi-jackers of Cythera, who were bound across the wide Pacific for South America when intercepted off Norfolk Island. A sergeant of Commonwealth Police, the entire force of law and order on Norfolk Island, gave chase in Colorado del Mar and when Cythera would not heave-to and could not be boarded even after being subjected to a hail of potatoes thrown by the French pursuers, the French commander employed truly Gallic tactics, ferocious yet economical. He ordered the ship's supply of beer bottles to be broached, the crew to drink the contents and then use the bottles, filled with sea water, as missiles. Even these steps failed to subdue the enemy until both vessels finally collided, perhaps not surprising in the circumstances. It was the French vessel's claim for salvage reward on recovery of Cythera from the hi-jackers that came before Macfarlan J. and raised those difficult issues of law habitual in salvage cases.

A very different salvage case, also with human interest, was the Oceanic Grandeur[12], a giant tanker aground on a coral pinnacle in Torres Straits, its Chinese captain with Oriental inscrutability rejecting the salvage services which the Australian would-be salvor sought to press upon him as the hours went by and the risk to the environment of massive oil pollution excited the Australian press. There finally were services rendered which I held to be salvage services but this case too raised difficult questions of law. A very strange instance of alleged salvage

arose in the case of the Gilt Dragon[13], where the salvor was a skin diver and hunter for treasure and the ship said to have been salved was the wreck of a Dutch galleon, sunk 321 years ago off the Western Australian coast. The case included a dispute between Commonwealth and State concerning the ownership of property on the off-shore seabed. If the practice of maritime law can give rise to cases such as these, practitioners in the field can put up with the more mundane problems of how to accommodate the appearance of roll-on, roll-off vessels to notions of a carrier's duration of liability being measured "from tackle to tackle", or of how container shipments can be accommodated to the limitation of a carrier's liability expressed in terms of so much per package or unit.

To mention in passing problems such as these is to skirt, and in doing so to acknowledge the existence of, that thoroughgoing re-examination of standard conditions for the carriage of goods by sea with which the UNCITRAL Working Group on International Legislation on Shipping has been concerned. This is very much an area for those able to devote the necessary time to gain a close familiarity with the many problems which are involved. All that this casual observer can do is to hope that there will be a resolution of those grey areas of responsibility at the beginning and ending of the carriage, before loading and after discharge (assuming, optimistically, that those

terms are not themselves of doubtful import). It may be that this will be brought about by some suitable extension of the carrier's period of necessary responsibility, thus reducing the area in which carriers are free to stipulate for wide immunities from liability.

The case of the Oceanic Grandeur brings to mind a quite different area of maritime law, unknown last century but now of increasing concern; an area calling for all the creative talents of those concerned with maritime law. Not only are ships fuelled by oil, they transport immense quantities of it and, as events have proved, spillages inevitably occur, some causing great damage. The future may also involve nuclear fuelled vessels plying the oceans. The need for international co-operation both in the framing of safeguards and in the provision of appropriate compensation for, and machinery for its recovery by, those affected by resultant pollution of the ocean and of the littoral is obvious and here maritime lawyers have already played a major role and will continue to do so. The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships is an example of their work. The impact will also be felt in municipal systems of law. The escape of oil from under an off-shore drilling platform off the Californian coast near Santa Barbara in 1969 illustrates this. Commercial fishermen of the area sought damages including loss of profits due to a

reduction in the fishing potential of their fishing grounds. In Union Oil Company v. Appen[14], they succeeded in recovery of damages, despite the fact that the loss was pure economic loss with no injury to any property of the plaintiffs. The spillages from the SS Inverpool, which gave rise to the injury complained of in Esso Petroleum v. Southport Corporation[15], decided in the House of Lords in 1956, from the Universe Leader in Ireland's Bantry Bay in 1974, from the Wagon Mound[16] in Sydney Harbour, and the notorious case of the Torrey Canyon are instances of the situations that will occur and for which the law, both maritime and general and both international and municipal, is finding appropriate answers and must continue its efforts in this direction. The Comité Maritime International played a noteable role in the activities of the Intergovernmental Maritime Consultative Organisation in connexion with claims arising out of Torrey Canyon. The I.M.C.O. conference on Marine Pollution led to the 1973 Convention on the topic and to a Protocol on intervention in the case of marine pollution otherwise than by oil.

Your Association is fortunate indeed that its interests lie in the fascinating world of maritime law and the community will be fortunate if your activities help to promote an active interest in that law in Australia.

I would conclude by saying how honoured I am not only to be asked to speak to you here today at this opening of your

annual meeting but to be doing so in tribute to the memory of Frank Dethridge, your distinguished first President. He was a man learned in the law and with a great interest in and much experience of shipping law. Those members of the Victorian Bar fortunate enough to be briefed by him in shipping matters were the wiser for his counsel. His wisdom, kindness and moderation will long be remembered in the profession. He had developed to an exquisite degree that high art of the instructing solicitor, how to teach counsel what he does not know but needs to learn for the case in hand, while conveying the impression all the while that it is he, the instructing solicitor, who is collecting pearls of wisdom as they fall from counsel's lips.

1. N.S.W. v. The Commonwealth (1977) 12 A.L.R. 129
2. Oteri and Oteri v. R. (1976) 11 A.L.R. 142
3. Chen Yin Ten v. Little (1976) 11 A.L.R. 353
4. A. Raptis & Sons v. South Australia (High Court - as yet unreported)
5. R. v. Bull (1974) 131 C.L.R. 203
6. Pearce v. Florence (1976) 9 A.L.R. 289
7. (1955) 95 C.L.R. 43
8. [1955] 1 Q.B. 158
9. [1962] A.C. 446
10. [1975] A.C. 154
11. [1965] N.S.W.R. 146
12. (1972) 127 C.L.R. 312
13. Robinson v. W.A. Museum (High Court - as yet unreported)
14. (1974) 501 Fed. 2nd. 558
15. [1956] A.C. 218
16. Overseas Tankship (U.K.) Ltd v. Miller SS Co. [1967] 1 A.C. 617