

## LIABILITY IN REM WITHOUT LIABILITY IN PERSONAM

Dr Damien Cremean\*

### 1. Introduction

Seldom in our law is dual liability required—where, before a liability can be established, another liability must first or also be established. Not so in Admiralty. There is claimed to be a rule—not widely known—in Admiralty, in Australia and in some other jurisdictions including Canada, that there cannot be liability in rem without there being at the same time liability in personam. A clear statement of this rule was given by Menzies J in *The Lastrigoni*<sup>1</sup> who said the ‘general rule of Admiralty is that an action in rem cannot be maintained when there is no liability in the owners’. This is usually cited in the context of maritime liens as, for instance, in *The Sam Hawk*.<sup>2</sup> But authorities show the so-called rule has *not* been confined to liens, and they also show that it has not always been the rule in Admiralty in any event. Moreover, it certainly is not, and never was, the rule in Admiralty in the United States. As well, there have even been occasions in the United Kingdom where doubts have been expressed about the rule. Indeed, some cases have held to the contrary. So there is or may be occasion to doubt that it is or ever was the rule. A number of questions arise. Given this is the rule, how did it develop? Why did it develop? Why was it not adopted as the rule in the United States? Finally, should we in Australia and New Zealand continue to apply the rule?

As regards the last question, the conclusion reached in the following analysis is that the rule—if we concede for the moment exists—should be discarded. That can only take place in Australia by the High Court expressly departing from this part of *The Lastrigoni* decision, overruling the decision altogether or by legislative intervention.

### 2. Background to the Ruling

Menzies J in setting out the rule, referred to an earlier High Court ruling in *The Fort Laramie*<sup>3</sup> and also to *The Castlegate*.<sup>4</sup> He referred also to *Foong Tai & Co v Buchheister & Co* (*‘Foong Tai’*)<sup>5</sup> which was submitted to him to be contrary authority. He regarded that case, however, as having been decided ‘upon very special facts’ and he agreed with the explanation of that case given by Kriewaldt J in *Dalgety and Co Ltd v Aitchison* (*‘The Rose Pearl’*).<sup>6</sup> The earlier High Court ruling referred to by Menzies J was given by Knox CJ whose decision was unanimously reversed by the High Court on appeal, but not on this point.<sup>7</sup> In the course of his decision Knox CJ referred to *The Castlegate* but indicated that he relied principally on later Privy Council authority in *Owners of SS Utopia v Owners and Master of SS Primula* (*‘The Utopia’*).<sup>8</sup> Knox CJ also referred to the decision of Phillimore J in *The Emilien Marie*<sup>9</sup> which he said appeared opposed to his conclusion but which he said he considered was able to be explained away as a decision on its facts.

### 3. Origin of the Ruling

The Privy Council in the judgment in *The Utopia* delivered by Sir Francis Jeune said that the rule is one of the ‘principles of maritime law now well recognised’.<sup>10</sup> The decision in that case was delivered only six months after the decision of the House of Lords in *The Castlegate*. Lord Watson participated in both decisions. At the time of the decision in *The Fort Laramie*, the High Court of Australia considered itself bound by decisions of the Privy Council. Indeed, it was not until 1963 in *Parker v The Queen*<sup>11</sup> that the

---

\*Adjunct Professor, University of Queensland. Many thanks to anonymous reviewers.

<sup>1</sup> (1974) 131 CLR 1, 6.

<sup>2</sup> (2016) 246 FCR 337, 345–6 [9] (Allsop CJ and Edelman J).

<sup>3</sup> (1922) 31 CLR 56, 63.

<sup>4</sup> *The Castlegate* [1893] AC 38.

<sup>5</sup> [1908] AC 458 (*‘Foong Tai’*).

<sup>6</sup> (1957) 2 FLR 219 (Northern Territory Supreme Court) (*‘The Rose Pearl’*).

<sup>7</sup> *The Fort Laramie* (1923) 32 CLR 25.

<sup>8</sup> [1893] AC 492, 499 (*‘The Utopia’*).

<sup>9</sup> (1875) 32 LT 435.

<sup>10</sup> *The Utopia* (n 8) 499.

<sup>11</sup> (1963) 111 CLR 610.

High Court felt free to depart from decisions even of the House of Lords. But it is possible to see why Knox CJ decided he should rely on Privy Council authority in *The Utopia*.

The main judgment in *The Castlegate* was delivered by Lord Watson. Lord Herschell LC and Lord Field delivered separate judgments but the outcome was unanimous. It was held that the master had no lien on the vessel for disbursements for which it was decided on the facts he had no authority to pledge the shipowner's credit. Being then without a lien on the ship, he could have no separate lien on the freight. Lord Watson referred to a number of authorities ending he said with *The Sara*<sup>12</sup> which he regarded as establishing, in conformity with earlier decisions, 'the principle that there could be no lien upon ship in respect of disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien could attach to the res for any sum which was not a personal debt of its owner'.<sup>13</sup>

Lord Watson also delivered the leading judgment in the earlier House of Lords decision in *The Henrich Björn*<sup>14</sup> in 1886 where he expressed a similar view. Speaking of a creditor in an unsecured claim he said that party 'cannot have an action in rem unless at the time of its institution the res is the property of his debtor'.<sup>15</sup> In an interesting—and unusually personal—aside, Lord Watson, referring to the question whether s 6 of the *Admiralty Court Act 1861* (UK) created a maritime lien for necessities, said the appellants had referred to the decision of Dr Lushington in *The Ella A Clark*<sup>16</sup> but he said '[n]o one has done more to impair the authority of his decisions in *The West Friesland* and *The Ella A Clark* than Dr Lushington himself, by his clear statement of the law in other cases.'<sup>17</sup> Kriewaldt J in *The Rose Pearl*<sup>18</sup> regarded *The Henrich Björn*—although a decision of the House of Lords—as binding authority on him which, at the time, until the decision in *Parker v The Queen*, it was.

Although Menzies J in *The Lastrigoni* referred to *The Henrich Björn* in his judgment, it is the later statement of authority in *The Utopia* founded on Lord Watson's judgment in *The Castlegate* that is central to his ruling—*The Utopia* being the judgment which was central in turn to the ruling of Knox CJ in *The Fort Laramie*. Referring to *The Castlegate* in *The Utopia* the Privy Council noted that it had been suggested in argument that the vessel in that case could be liable in an action in rem though there be no liability in the owners. That was the contention the Privy Council said was 'contrary to principles of maritime law now well recognised'. The Privy Council allowed, however, that at the time the action is brought 'a ship may be made liable in an action in rem, though its then owners are not...'<sup>19</sup> This was 'because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners'.<sup>20</sup> But the Privy Council added: 'the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence...'.<sup>21</sup> The result then would be that 'the ship is no more liable than any other property which the owners at the time of collision may have possessed'.<sup>22</sup>

## 4. Analysis

There are three matters to draw attention to. First, the reasoning of Lord Watson in *The Castlegate*. Secondly, the allowance made by the Privy Council in *The Utopia*. Thirdly, the nature of a maritime lien. These together seem to undermine the very rule laid down and lead us to question: why ever was it developed?

### 4.1. Lord Watson's Reasoning

There is a clear shift in the reasoning of Lord Watson in *The Castlegate*, which is mainly responsible for the later adoption of the rule. He goes from the specific—that is, specific to the case before the House—to a much broader proposition. There might be no disagreement with his decision that the master had no

---

<sup>12</sup> (1887) 12 PD 158.

<sup>13</sup> *The Castlegate* (n 4) 51.

<sup>14</sup> *C & CJ Northcote v Owners of the Henrich Björn* (1886) 11 App Cas 270 ('*The Henrich Björn*').

<sup>15</sup> *Ibid* 277.

<sup>16</sup> (1863) Br & L 32; 167 ER 283.

<sup>17</sup> *The Henrich Björn* (n 14) 280. See *The West Friesland* (1859) Swa 454; 166 ER 1213; reversed (1860) Swa 456; 166 ER 1214.

<sup>18</sup> *The Rose Pearl* (n 6) 226.

<sup>19</sup> *The Utopia* (n 8) 499.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*.

authority to pledge the shipowner's credit. There might be no difficulty in him then saying the master therefore had no lien on the ship for disbursements. But he goes from this to the general statement—which he says is 'in other words'—that 'no maritime lien could attach to the res for any sum which was not a personal debt of its owner'.<sup>23</sup> It is, however, one thing to speak of the case before him and liability in rem in that case and quite another to speak then generally of liability in rem in *all* cases—expressed as being 'in other words'. These are not 'other words': they are not in reformulation but are additional words. Lord Watson had no need to add these words in order to reach his decision. It was an unnecessary addendum. Yet it is this generalisation which lies behind the decision in *The Utopia* which forms the basis of Knox CJ's reasoning in *The Fort Laramie* which then was applied by Menzies J in *The Lastrigoni* decision.

Exactly why Lord Watson went on to generalise in this way is not clear. Perhaps he was concerned to ensure that liability in rem remained firmly fixed upon liability in personam of the owners so as to ensure that the law did not develop along the lines of authorities in the United States where, by that time and long before it, liability in rem did not require liability in personam because of the view taken there about the personification of the ship. He may have found this alarming—the thought that English law might find a thing liable separately from the liability of a person. But there was a direct precedent for this is *The Lemington*<sup>24</sup> where Sir Robert Phillimore in 1874 held that the owners of a ship damaged by the *Lemington* had a lien on that vessel despite the fact that at the time it was wholly in control of charterers as *pro hac vice* owners. Reference might also be made to the 1888 decision of Sir James Hannen P in *The Tasmania*<sup>25</sup> where the offending vessel appears to have been on weekly hire or charter only.

Lord Watson's addendum also betrays unfamiliarity with established admiralty law concepts. The fiction of a ship as a person was well recognised in English law as a means by which the Admiralty Court was able to defend itself against attacks from the common law courts in the incessant war between them over the centuries. In *Republic of India v India Steamship Co Ltd [No2]* ('*The Indian Grace [No 2]*')<sup>26</sup> Lord Steyn explained this as follows:

The common law courts effectively blocked the assumption by the High Court of Admiralty of in personam jurisdiction. This was done by writs of prohibition to restrain the expansion of the jurisdiction of the High Court of Admiralty. The writ of prohibition did not extend to the Admiralty jurisdiction over the ship. Maritime liens over the ship were immune from the writ of prohibition ...

The common law courts could not countenance as a party anything but a natural person—not a ship—and this device protected the Admiralty Court from the successive blows of the prohibition writs issued out of the common law courts. To quote Lord Steyn again: 'Admiralty practitioners and judges [thus] used the concept that the ship is a defendant in an action in rem as a means of defending and extending the jurisdiction of the High Court of Admiralty.'<sup>27</sup> But Lord Watson was of the Scottish Bar and was never an admiralty lawyer so this could have been a novel area for him. There is a strong chance he may not have been aware of some of the subtleties involved in this difficult and esoteric area. A suggestion of this can be detected in remarks he made in *The Henrich Björn*.<sup>28</sup> An interesting observation on this moreover is made by Lord Steyn in *The Indian Grace [No2]*<sup>29</sup>—'judges, steeped in Admiralty history with its civilian roots, tended to be more sympathetic to the personification theory than judges trained in the common law'. We cannot say that Watson being of the Scottish Bar was not aware of the civil law but we can say that the notion of a ship as the wrongdoer—and not as a person additionally—would not have been easy for him to countenance.

## 4.2. Utopia Allowance

The judgment in *The Utopia* was delivered by Sir Francis Jeune who, in contrast, had been President of the Probate, Divorce and Admiralty Division of the High Court of Justice. Dr Wiswall says that he 'had a greater influence upon the development of the Law of Admiralty than any single common lawyer since

---

<sup>23</sup> *The Castlegate* (n 4) 51.

<sup>24</sup> (1874) 2 Asp MLC 475.

<sup>25</sup> (1888) 13 PD 110, 118.

<sup>26</sup> [1998] AC 878, 906–7 ('*The Indian Grace [No 2]*').

<sup>27</sup> *Ibid.*

<sup>28</sup> *The Henrich Björn* (n 14) 279.

<sup>29</sup> *The Indian Grace [No 2]* (n 26) 907–8.

Coke.<sup>30</sup> This no doubt helps to explain the allowance made by the Privy Council in that case. Although the Privy Council referred to the rule laid down by Lord Watson as one of the ‘principles of maritime law now well recognised’, it did, at the same time, allow in certain circumstances that at the time the action is brought ‘a ship may be made liable in an action in rem, though its then owners are not’.<sup>31</sup> A lien by that time, Jeune explained, may already have arisen by reason of the negligence of the owners or their servants in a collision sufficient to bind subsequent owners. In other words, not by reason of a personal debt at all. Nothing adverse was said about *The Castlegate*, but the statement made in that case by Lord Watson obviously did not meet the exactitude which might be expected of one versed in Admiralty. Hence the Privy Council in *The Utopia* made express allowance for an action in rem to be brought to enforce a maritime lien even though at the time when brought no personal debt of the ship owner was owing. This significantly undermines that principle of maritime law mentioned by Lord Watson—in due deference in *The Utopia* a principle said to be ‘well recognised’. Accordingly, it undermines also the view of Knox CJ in *The Fort Laramie* and as a result undermines as well the rule stated by Menzies J in general terms in *The Lastrigoni* which it will be recalled is that ‘an action in rem cannot be maintained when there is no liability in the owners’. It undermines as well any cases subsequently relying on *The Lastrigoni* or calling its aid in support.

### 4.3. Nature of Maritime Lien

The leading case on maritime liens is *Harmer v Bell* (*The Bold Buccleugh*)<sup>32</sup> decided in 1851. Reference in this regard may be made to observations of Allsop CJ and Edelman J in *The Sam Hawk*.<sup>33</sup> Sir Francis Jeune in *The Utopia* alluded to the main feature of a lien—that it attaches to the *res* the moment facts giving rise to certain kinds of claim occur. The rule laid down by Lord Watson in *The Castlegate* impacts on this feature. A maritime lien is only enforceable by action taken in rem; yet, if at that time such action is maintainable only if there is liability in personam—for a debt is maintainable against the ship’s owner—then the areas in which maritime liens might arise are considerably limited or reduced. The maritime lien most obviously hampered by this would be the lien for damage done by ship. This is clearly not in accord with maritime lien theory or practice—the lien for damage was well recognised from at least the 1700s—and this is indeed the point made by Sir Francis in *The Utopia*. If, before a vessel may be arrested on the ground of a maritime lien, the owners must be personally liable on a debt, the range of cases in which a lien may be enforced could be few, if any. The utility and social benefits of the lien for damage following a collision would be lost in that event. The simple question is this: how then can it be argued—following a collision—that liability arises in rem only if there be personal liability in the *res* owner? The answer is that in such a case that cannot necessarily be argued at the time when the in rem action is brought. Collisions—applying the Watson view literally—could go unvisited by legal process and ships might go merrily on their way undeterred from doing yet further damage somewhere else. This shows why the rule laid down by Lord Watson in *The Castlegate* is so very far removed not only from orthodox or traditional learning but also from sound policy.

## 5. Other Cases

The United States has always adopted a different position on this question; as was said in *Dowell Division of the Dowell Chemical Co v Franconia Sea Transport Ltd*,<sup>34</sup> maritime law in the United States ‘has long established that a maritime lien may impose *in rem* liability in situations where the owner is not personally liable’. That is because the courts in the United States have adhered firmly to the personification theory of vessels. Holmes described a ship as ‘the most living of inanimate things’.<sup>35</sup> Thus, it was said even as recently as 1989 in *Salazar v The Atlantic Sum*<sup>36</sup> that ‘American courts [have], by and large, adopted a “personification” theory in which the vessel itself is a party and judgments are entered against her without the necessity of securing jurisdiction over the owner.’ Earlier even in 1901 the Supreme Court in *The Barnstable*<sup>37</sup> said that ‘the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of

<sup>30</sup> FL Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (Cambridge University Press, 1970) 132.

<sup>31</sup> *The Utopia* (n 8) 499.

<sup>32</sup> (1851) 7 Moo PC; 13 ER 884.

<sup>33</sup> *The Sam Hawk* (n 2) 345–6 [9].

<sup>34</sup> 504 F Supp 579, 580 (SD NY, 1980).

<sup>35</sup> OW Holmes, *The Common Law* (Little, Brown & Co, 1881) 26.

<sup>36</sup> 881 F 2d 73, 76 (3<sup>rd</sup> Cir, 1989).

<sup>37</sup> 181 US 464, 467 (1901).

anyone who is lawfully in possession of her, whether as owner or charterer'. Going even further back to 1819 Marshall CJ in *The Little Charles*<sup>38</sup> said that a vessel 'acts and speaks by the master'.

There are also cases in the United Kingdom where the rule laid down by Lord Watson can be said to have scarcely survived intact. In *The Ripon City*<sup>39</sup> for example, Gorell Barnes J in a careful review of all the authorities (including *The Castlegate* and *The Utopia*) said: 'I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the res are personally liable in respect of the claim'. This is in marked contrast. He continued that it will be found

in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of persons not personally liable for the claim, and who are not persons who, or whose servants, have required the service or done the damage.<sup>40</sup>

And of course, a maritime lien is only enforceable by action taken in rem. His views were referred to in the Court of Appeal in *The Tervaete*<sup>41</sup> where Scrutton LJ, although agreeing with the late Lord Gorell, said that 'for a lien to arise ... some person having by permission of the owner temporary ownership or possession of the vessel must be liable ...' This is unexceptionable in itself; were it otherwise a vessel might be burdened by a lien after being unlawfully taken. But it does show plainly that, on the basis of well-respected authority, liability in rem can be maintained separately from in personam liability of the res owner.

Even before *The Tervaete* the Privy Council itself in *Foong Tai*<sup>42</sup> had indicated a view departing from that of Lord Watson in *The Castlegate*, although not referring to remarks either from that case or *The Utopia*. The Privy Council said, referring to sums advanced by a party by way of necessaries, that, considering the wide words of the *Admiralty Court Act 1861*,<sup>43</sup> 'it by no means follows that they cannot sue in rem to recover these advances unless, as is contended, they are at the same time in a position to sue at law in personam for the same sums every person having a proprietary interest in equity in the ship'.<sup>44</sup> Kriewaldt J in *The Rose Pearl* distinguished *Foong Tai* (which Menzies J in *The Lastrigoni* agreed with) but the basis on which he did so is far from clear. His distinction of *Foong Tai* is one based on a reading of the facts<sup>45</sup>—'very special facts' Menzies J said they were<sup>46</sup>—but Kriewaldt J does not seem to come to grasp with principle. Rather, it seems that he was more concerned with a side-issue of attributing maritime lien status to a claim for necessaries.

The ruling given by Menzies J in *The Lastrigoni* still stands (and, as we shall see, was relied upon or referred to—it does not matter which—by Black CJ in *United States Trust Co of New York v Master and Crew of the Ionian Mariner* ('*The Ionian Mariner*')<sup>47</sup> but account must now be taken of remarks (particularly of Allsop J) in the Full Federal Court decision in *Comandate Marine Corp v Pan Australia Shipping Ltd*.<sup>48</sup> In the House of Lords in *The Indian Grace*<sup>49</sup> Lord Steyn spoke of '[t]he reality that an action in rem is an action against the owner of the ship ...'.<sup>50</sup> But this, it is clear, fails to differentiate between the action in rem and the action in personam and assimilates the two. A personification theory of vessels accordingly has no place. In a withering analysis, Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* rightly points out errors in this way of reasoning about an in rem proceeding on the part of Lord Steyn. He also points to other misgivings about Lord Steyn's judgment. Finkelstein J agreed with Allsop J but Finn J reserved his position. Allsop J said the action in rem when commenced is not against a person: 'It is against the ship'.<sup>51</sup> That is, against the ship as separately liable on its own.

---

<sup>38</sup> 26 Fed Cas 979, 982 (Va Cir, 1819).

<sup>39</sup> [1897] P 226, 242.

<sup>40</sup> Ibid.

<sup>41</sup> [1922] P 259, 270.

<sup>42</sup> *Foong Tai* (n 5).

<sup>43</sup> 24 & 25 Vict, c 10.

<sup>44</sup> *Foong Tai* (n 5) 467.

<sup>45</sup> *The Rose Pearl* (n 6) 229.

<sup>46</sup> *The Lastrigoni* (n 1) 6.

<sup>47</sup> (1997) 77 FCR 563 ('*The Ionian Mariner*').

<sup>48</sup> (2006) 157 FCR 45.

<sup>49</sup> *The Indian Grace* [No 2] (n 26).

<sup>50</sup> Ibid 909.

<sup>51</sup> *Comandate Marine Corp v Pan Australia Shipping Ltd* (n 48) 79 [119].

To hold otherwise he said is to debilitate the in rem proceeding.<sup>52</sup> The action in rem he said ‘is a necessary tool of international maritime commerce for the recovery of just claims’.<sup>53</sup> He added: ‘To treat it as the equivalent of the *in personam* claim risks making it a dangerous lottery, thereby diminishing its practical value.’<sup>54</sup> These are not remarks inclined to give in rem liability a role derivative upon a prior finding of liability in personam.

## 6. Statutory Considerations

The ruling in *The Lastrigoni* was given well before the *Admiralty Act 1988* (Cth). It is to be noted that the in rem provisions of the Act (ss 14–19) do not *specifically* say anything about a prior requirement of in personam liability although, of course, with several or many of them, because of the nature of the case, one will arise. The Act was the product of the work of the Australian Law Reform Commission (‘ALRC’) in its *Civil Admiralty Jurisdiction Report* (‘Report’).<sup>55</sup> The Report mentions *The Lastrigoni*—and cases to which Menzies J makes reference—and the subject of the ruling in that case is discussed generally. It is accepted that the Report should be used as a guide when interpreting the Act. Indeed, on this point Black CJ in *The Ionian Mariner*,<sup>56</sup> quoting *The Lastrigoni*, said that before the Act ‘it was generally accepted in Australia that the position at common law was that a statutory right of action in rem did not lie unless the owner was liable in personam on the claim or the owner could be treated as if liable by virtue of a form of implied consent ...’ He added: ‘It is clear, in my view, that [the Act] was not intended to change the law in this respect.’<sup>57</sup>

It is not clear, however, that the ALRC was confident—without doubt—in the conclusion it reached on this point. It said its conclusion was that liability in rem should lie only where, when the action is commenced—other than one on a proprietary claim under the Act—the owner or demise charterer is liable.<sup>58</sup> But then, unusually, it went on to give an alternative view should that view not be accepted: namely, that provision might be made for a right of action in rem with respect to the liabilities of any person who is the operator of the ship (including a time charterer) ‘on the ground that a wider right of action *in rem* is desirable in Australia’s interests...’<sup>59</sup> Although the ALRC did not specifically recommend a change in the law set out in *The Lastrigoni*—as Black CJ correctly says—the Report was clearly prepared with an eye to the future. That is, bearing in mind the possibility of a different position should its first view not prove acceptable to government.

Black CJ in his analysis relies only on the Report and *The Lastrigoni* ruling and the cases referred to by Menzies J (and *Foong Tai* and *The Rose Pearl*) and goes no further. But on this occasion, it is open to doubt that the ALRC considered all the relevant authorities. Analysis of *The Utopia*, for instance, does not mention the statement of the Privy Council—that ‘at the time an action is brought, a ship may be made liable in an action in rem, though its then owners are not ...’<sup>60</sup> Nor is this mentioned by Black CJ, but he had the difficulty of being faced by the High Court pronouncement in *The Lastrigoni*. However, statements of principle of Dr Lushington in *The Ticonderoga*<sup>61</sup> and of Sir Robert Phillimore in *The Lemington*<sup>62</sup> (referred to earlier) are not quoted in the Report and those cases only rate footnote mention. These cases stand for a different proposition to the one stated by Menzies J in *The Lastrigoni*. The decision in *The Father Thames*<sup>63</sup> given in 1979—five years after *The Lastrigoni*—gets one footnote mention but in that case Sheen J held that a maritime lien arose even though those directly responsible for the collision were servants of the demise charterer and not the true owners. The decision in *The Tasmania*<sup>64</sup> (referred to earlier) is cited in a footnote in the Report but it is not mentioned except elliptically that the offending vessel in that case appears to have been on weekly hire or charter only.

---

<sup>52</sup> Ibid 79 [118].

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> (Report No 33, December 1986) (‘Report’).

<sup>56</sup> *The Ionian Mariner* (n 47) 584.

<sup>57</sup> Ibid 585.

<sup>58</sup> Report (n 55) [136].

<sup>59</sup> Ibid [137].

<sup>60</sup> *The Utopia* (n 8) 499

<sup>61</sup> (1857) Swab 215, 217; 166 ER 1103, 1104.

<sup>62</sup> *The Lemington* (n 24).

<sup>63</sup> [1979] 2 Lloyd’s Rep 364.

<sup>64</sup> *The Tasmania* (n 25).

All up, the position is not as straightforward as Black CJ would have it. Reliance on the ALRC Report cannot be regarded as conclusive on the point. There is more to be said about the ruling given by Menzies J than appears simply by quoting from the Report. Going into the authorities in existence before the time of his ruling—later relied on or referred to by Black CJ—means assent cannot be given unreservedly to the general rule posited by Menzies J which Black CJ said was the ‘generally accepted’ position in Australia before the Act was passed. Certainly, that was what was stated by Menzies J but the authorities in existence before Knox CJ gave his ruling in *The Fort Laramie* case—followed by Menzies J—were, at best, in a state of conflict or confusion. But we can accept that Menzies J was bound to follow *The Fort Laramie* decision of Knox CJ and that Black CJ was bound to follow Menzies J. The error giving rise to *The Lastrigoni* ruling lies much further back.

In the course of his judgment in *The Ionian Mariner*, Black CJ made reference to s 6(b) of the *Admiralty Act*. This states the Act it is not intended to have effect to create a cause of action that would not have existed if the Act had not been passed. Discarding the ruling in *The Lastrigoni*—or this aspect of it—because it is built on shaky ground does not create a new cause of action. Something is not being added which was not there before. It is merely to remove a procedural impediment to in rem proceedings which in reality should not have been there in the first place. The same cases that will give rise to liability in rem will give rise to liability in personam. But the requirement to establish the latter will not impede the former any longer. No new cause of action is thereby created.

Considered legislatively, if that course is the one followed, there can be no doubt that the Parliament has the power under s 76(iii) of the Constitution to amend the *Admiralty Act* based on the decision in *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc*.<sup>65</sup>

## 7. Conclusion

The House of Lords in Lord Watson’s judgment in *The Castlegate* took a wrong turn in unnecessarily wide remarks. That was apparent to the Privy Council in *The Utopia*, and Sir Francis Jeune was forced to soften the position in that case by making due allowances. But the wrong turn in *The Castlegate* has never been completely eradicated. It was not criticised by Knox CJ in *The Fort Laramie* decision—understandable due to the operation of 1920s *stare decisis*. It surfaced again in the general rule restated by Menzies J in *The Lastrigoni* due to *The Fort Laramie* decision. There matters currently stand except for this: time has moved on and after the remarks of Allsop J in *Comandate Marine Corp v Pan Australia Shipping Ltd*, there is no occasion any longer to give in rem liability an inferior status whereby it arises only on there being prior liability in personam, for liability in rem is a separate liability against the ship as he makes clear.

It is time then to revisit the rule when the opportunity arises. No harm is done—and only good is done—by discarding it altogether. Fundamentally the rule seems to serve no useful purpose and over the years must have done many injustices. Cases which should have been heard and determined in the courts have likely missed out. In reality the simple question is this: why *should* there be liability in rem only if there is liability in personam? This was never the rule in the law of the United States and even authority in the United Kingdom is doubtful about it or is to different effect. No good reason can be given in answer to the question. There is reason only to discard the rule in Australia—either by express disapproval by the High Court or by statutory amendment. Assuming the rule set down by Knox CJ and repeated by Menzies J did correctly represent the law—something not free from doubt at all—the time has come to revert to an approach resembling the action in rem as it was historically understood to be when first developed.

This is not as foreign as it might seem. In our law already we recognise artificial persons in corporations with shareholders. A ship as a legal person with shareholders is of course a fiction and as Lord Steyn reminds us in *The Indian Grace [No2]*,<sup>66</sup> the ship as a person always was a fiction. We should not wish to join him in this and go on to say that the action in rem itself is a fiction. The action in rem is real and is one against a ship as a separate entity but with that ship fictionally regarded as a legal person. That is as far as we should take the fiction. The important point is that while the ship as a legal person is a fiction, an action in rem brought against one is real and is itself no mere fiction.

---

<sup>65</sup> (1994) 181 CLR 404.

<sup>66</sup> *The Indian Grace [No 2]* (n 26) 913.