CHAPTER 2

THE COURT RESURGENT

AS THE Admiralty Court in the era of Lord Stowell had awakened from a slumber of centuries, so it was that during the tenure of another eminent civilian, Dr Stephen Lushington, any lethargy of arousal gave way to a quick pulse of vitality.

Lushington, born in 1782, was educated at Eton and Oxford, where he attended Christ Church and became a Fellow of All Souls in 1802; he was called to the bar by the Inner Temple in 1806, and received his D.C.L. in 1808, becoming a member of Doctors' Commons in that same year. He was a Whig Member of Parliament from 1806 to 1808 and from 1820 to 1841, where his liberality in advocating the abolition of capital punishment, his opposition to the repression of Ireland and his vehemence against slavery earned for him a measure of notoriety. He succeeded Sir Christopher Robinson as Judge of the Consistory Court of London in 1828, succeeded Sir John Nicholl as Judge of the High Court of Admiralty in 1838, and became Dean of Arches and Master of the Faculties in 1858; he resigned as Admiralty Judge and Dean of Arches in 1867, but continued to hold the Mastership of the Faculties until his death in 1873.[1]

During the judgeship of Sir John Nicholl, the 1833 Report from the Select Parliamentary Committee lay unacted upon; but Lushington was determined to secure legislation which would implement the recommendations of 1833 for a wider Admiralty jurisdiction. As a Member of Parliament himself, Lushington was well-placed to spur the desired activity, and, in 1840, an Act was passed which effectively abolished the restrictions of the Acts of Richard II and confirmed and extended the Court's general jurisdiction, but which, despite the favourable and explicit recommendations of the select committee, did not restore to the Court the anciently profitable jurisdiction over all questions of contract, freight, and charter-party.[2] New jurisdiction conferred by the 1840 Act included cognizance of mortgages on ships

[1] Holdsworth, *H.E.L.*, vol. 16, pp. 140–6; *D.N.B.*
[2] Marsden, 'Six Centuries', p. 175.

incidental to actions *in rem*, questions of legal title and the division of proceeds of sale in suits of possession, and any 'claims in the nature of salvage' for services and necessaries[1]—all as recommended in the 1833 Report[2]—as well as claims for towage (a service reduced from the status of salvage by the advent of steam propulsion[3]) and such questions of 'Booty of War'[4] as might be submitted to the Admiralty Court by the Privy Council. It was made plain upon the face of the Act, however, that none of the jurisdiction thus conferred was exclusive, but concurrent with that of the courts of law and equity.[5]

One particularly curious provision of the 1840 Act was the inclusion of a discretionary power by which the Court might direct a jury trial of issues of fact to be held at common law, the power to grant a retrial of such issues if necessary—itself an appealable matter—and certification of the trial record up to the Admiralty Judge, together with any bill of exceptions.[6] This provision can only have been an attempt by the common lawyers to introduce the jury trial into Admiralty, and was probably taken from a recommendation in the 1833 Report[7] which, however, suggested a power of impanelling a jury of *merchants* [mercantile assessors, as are used in the continental civil law] at the discretion of the Judge or option of the parties. Such a trial would have taken place before some judge of assize or of a superior court,[8] but only one case has appeared in which such a jury was in fact impanelled,[9] and the function of the jury in that case is not known.

As fate would have it, the price paid by Dr Lushington to secure passage of the 1840 Act was both high and personal. In 1820 Lushington had appeared with Brougham, at the latter's request, as counsel for the defence of Queen Caroline in her trial upon a charge of adultery; the defence was eminently successful, the proceedings were halted, and the brilliant performance of Lushington, among others, marked him for future achievement.[10]

[1] Admiralty Court Act, 1840, §§3, 4, 6.
[2] Parl. Paper [1833] (670) vii (H.C. 15 August), p. 4.
[3] Roscoe, *Practice*, p. 187.
[4] Admiralty Court Act, 1840, §22.
[5] Admiralty Court Act, 1840, §23. [6] Admiralty Court Act, 1840, §§11–16.
[7] Parl. Paper [1833] (670) vii (H.C. 15 August), p. 4.
[8] See Coote, 1st ed., p. 58.
[9] *Schroeder, Gebrüder & Co. v. Myers & Co.*, (1886) [unrep.], cited by Pritchard and Hannen, intro., p. vii.
[10] See Holdsworth, *H.E.L.*, vol. 16, pp. 140–6; *D.N.B.*

But by 1840 Lord Brougham, a rebellious Whig and a bitter political foe of the Whig Government of Lord Melbourne, had fallen out with Lushington, one of its strongest supporters in the Commons.[1] When the bill for the 1840 Act was introduced, Brougham vowed to kill it in the Lords unless a clause was inserted which would specifically disqualify the Admiralty Judge from sitting in Parliament.[2] Though a tremendous political hassle followed, Brougham was triumphant, and in a separate but simultaneous enactment it was provided that no person holding the office of Admiralty Judge should be eligible to be elected to or sit in any future Parliament;[3] this must have been a considerable blow to Lushington, for each of his predecessors as Judge in that century had been Members of Parliament, and Stowell held his seat during nearly all of his tenure, relinquishing it only upon his elevation to the peerage.

There was, however, some compensation for the loss of Lushington's seat in Parliament; the remuneration of the Admiralty Judge had hitherto been based upon fees collected by the Court, and despite the great decline in the Court's business, these fees had been adjusted only once since the conclusion of the Prize adjudications;[4] thus the same section of the 1840 Fees Act which disqualified the Judge from a Parliamentary seat also established a salary for the Judgeship of four thousand pounds *per annum*, to be paid out of the Consolidated Fund if not met by the Court fees, any surplus in fees thereafter being consigned to the Consolidated Fund in return.[5]

Aside from the clear extension of jurisdiction in §6 of the 1840 Act, it was unclear for some time following its passage what the effect of its other provisions would be. The language of §4, giving the Court jurisdiction of 'all questions' of salvage and damage was eventually held to apply to such causes arising in *any* locality, if involving a seagoing vessel,[6] but it was held that the same language applied to causes of title, also included in §4, would not permit the Court to entertain a suit for title to freight where no ancillary question was justiciable as well;[7] and it was said that

[1] See Merriman, P., *Address to the Canadian Bar Association*.
[2] See Campbell, pp. 503–4. [3] High Court of Admiralty [Fees] Act, 1840, §1.
[4] See Parl. Paper [1833] (670) vii (H.C. 15 August), p. 60.
[5] High Court of Admiralty [Fees] Act, 1840, §1.
[6] See Edwards, pp. 151, 188–9.
[7] *The Fortitude*, (1843) 2 W. Rob. 217; 2 Not. Cas. 515.

only legal title was determinable under the same section,[1] though the Court had previously considered equitable titles, and even legal titles, to the extent of ensuring that such titles were not sham, and set up merely to defeat the Court's jurisdiction.[2] But the general rule-of-thumb for interpretation of the 1840 Act was laid down by Dr Lushington in *The Fortitude* as follows: '[The Act] was not, I apprehend, intended to confer any new separate and distinct powers on this Court, but merely to enable the Court to exercise its ordinary jurisdiction to the full extent.'[3]

There was not to be another direct statutory revision of the Admiralty jurisdiction for twenty-one years following the 1840 Act, but other enactments during that period did affect the Court's scope of activity in several ways. A segment of the Court's ancient jurisdiction disappeared in 1846 with the abolition of deodands,[4] but in the succeeding year the Court gained a new jurisdiction over all questions arising under an Act for the improvement of port facilities.[5] Jurisdiction to adjudge piracy for the purposes of awarding bounty and condemning pirates' goods was given in 1850,[6] and some almost incredible claims came before the Court in pursuance thereof.[7]

Throughout the history of the Admiralty Court there occur periods in which the position taken regarding a particular exercise of jurisdiction shifts rapidly across the judicial spectrum; one such perplexing matter was that of the jurisdiction of the Court to entertain a claim for the salvage [saving] of life in the absence of the salvage of property, as complicated by statutory enactments. Lord Stowell made the position clear in his judgeship, acknowledging that: 'The mere preservation of life, it is true, this Court has no power of remunerating . . .',[8] and this was the view taken by Dr Lushington in 1842.[9] In 1846, however, an Act was passed which, in the plainest language, appeared to authorize salvage recovery for the saving of life alone;[10] a leading textwriter then interpreted the Act as only prompting the Court's earnest consideration of a high award where life and property were saved,

[1] Edwards, p. 50.
[2] See *The Warrior*, (1818) 2 Dod. 288.
[3] Quoted by Edwards, at p. 49.
[4] [Abolition of] Deodands Act, 1846.
[5] Harbours, Docks & Piers Clauses Act, 1847.
[6] Piracy Act, 1850, §§2, 5.
[7] See especially *The Magellan Pirates*, (1853) 1 Sp. 81.
[8] *The Aid*, (1822) 1 Hag. Adm. 83, 84.
[9] *The Zephyrus*, (1842) 1 W. Rob. 329, 331.
[10] Wreck and Salvage Act, 1846, §19.

rather than giving a new recovery[1] for the salvage of life alone. In 1854 Dr Lushington awarded a substantial sum for life salvage under the Act of 1846 in a case in which very valuable property was also salved, but he observed that the 1846 Act was specifically worded to permit recovery for life salvage;[2] in the same year as that decision, another statute[3] gave a recovery for life salvage in much the same terms as the 1846 Act, which was thereupon repealed.[4] In 1865, however, Dr Lushington considered the history of life salvage awards in Admiralty and concluded that prior to 1854, there could have been no award for life salvage apart from the salvage of property.[5] It is therefore impossible to state with certainty that the Admiralty Court acquired jurisdiction to grant awards for the salvage of life alone under the Act of 1846, though the plain language of the statute would seem to have given that jurisdiction.

The Merchant Shipping Act of 1854 was the first comprehensive enactment concerning the Merchant Navy; its most important administrative feature was the transfer of superintendence of the Merchant Navy from the Admiralty to the Board of Trade,[6] and the Receiver General of Droits of Admiralty and all other receivers of droits were also placed under the control of the Board of Trade in the same year.[7]

One of the most pressing concerns of the day, reflected in the 1854 M.S.A., was the need for protection of the merchant seaman. He earned little enough to begin with, was expected to undergo the deprivations of long voyages, and was subject not only to the hazards of the elements, but also that of the Royal Navy press gangs—and the statutory penalty for merely cursing his fate could be two hours in the stocks.[8] Worse still, perhaps, was the degree of physical mistreatment, not only at the hands of their captors,[9] but by their own shipmasters.[10] Suits by mariners for such malicious personal injury occasionally came before the Admiralty Court,

[1] Edwards, pp. 195–6; see also pp. 193–4.
[2] [*Ten Bars of*] *Silver Bullion*, (1854) 2 Sp. 70.
[3] Merchant Shipping Act, 1854, Part 8.
[4] Merchant Shipping Repeal Act, 1854, §4.
[5] *The Fusilier*, (1865) Br. & Lush. 341, 344.
[6] Merchant Shipping Act, 1854, Part 1.
[7] Merchant Shipping Repeal Act, 1854, §§10, 11.
[8] See Maxwell, pp. 541–2.
[9] See, *e.g.*, *Die Fire Damer*, (1805) 5 C. Rob. 357.
[10] See, *e.g.*, *The Agincourt*, (1824) 1 Hag. Adm. 271.

and damages were occasionally awarded; but at that time any master might lawfully order a seaman to be flogged, needing only to show, upon complaint by the crew, that his order was reasonable under the circumstances.[1] It is a grave social commentary simply to note that in *The Lowther Castle* Lord Stowell held that a flogging of thirty-six lashes after five days in irons was a 'justified' punishment for a seaman whose sole offence was said to be 'laziness and disrespect'.[2]

It seems incredible in the present day that the civilized societies of Britain and America could for so long have remained indifferent to that wretched human condition; what eventually spurred authority to move against such brutalities was the public outcry raised in response to publication of the facts by such men as Dr Richard Henry Dana of Boston, an Admiralty lawyer who published both in the United States and England a narrative of his voyage around Cape Horn in 1834 as an ordinary seaman in the brig *Pilgrim*; the true account of the normal treatment of crewmen in Dana's *Two Years Before the Mast* surely must have made grim reading even in that day. But there was a touch of irony in this needed reform, for under the 1840 Act the Admiralty Court lost jurisdiction over claims for personal injury save in causes arising upon the high seas, inasmuch as §6 of the Act was interpreted to apply only to property damage.[3]

If the physical abuse of the merchant seaman was deplorable, the advantage taken of him in more insidious ways may have been worse yet. Seamen were considered fair game for cheating of the basest sort, and their chief defender, the Admiralty Court, was not always perfectly assiduous in the discharge of its duty to its 'wards'.[4] It can be said, however, that the Court was in general quite successful in exercising its equitable jurisdiction to uphold mariners' wage claims despite agreements which were designed to frustrate them in contravention of the general maritime law.[5] By comparison, the same claims fared very poorly at common law, and it was necessary to secure enactment in 1835 of provisions which guaranteed the inviolability of the seaman's wage claim in an action at law, and which encouraged mariners to bring their

[1] Abbott, p. 240.
[2] (1825) 1 Hag. Adm. 384.
[3] See Edwards, p. 155.
[4] See, *e.g.*, *William* [*Moakes's*] *Money*, (1827) 2 Hag. Adm. 136.
[5] See Edwards, pp. 138–9.

actions for wages in the common law courts rather than in Admiralty;[1] a re-enactment of the same basic provisions in 1844 provided more explicit guidelines for relief, and also transferred the great bulk of wage claims to the common law courts by establishing twenty pounds as the minimum limit of a claim for wages to be suable in Admiralty, unless the shipowner had been declared a bankrupt.[2] The 1854 M.S.A. sought to relieve even further the burden which these suits for wages placed upon the Admiralty Court by giving cognizance of such claims to any two Justices of the Peace, and raising the minimum claim limit for Admiralty jurisdiction to fifty pounds, though waiving the limit in cases of the owner's bankruptcy, or where the ship had been arrested and sold in Admiralty, or where neither the owner nor master resided within twenty miles of the place where the claimants were discharged or put ashore.[3]

Certain other miscellaneous provisions of the 1854 Merchant Shipping Act are worthy of note: masters were for the first time given the same remedies for wage recovery as seamen, but Admiralty was also given cognizance in such cases of defences including counterclaims and set-offs, as well as a statutory confirmation of the inherent jurisdiction to remove masters;[4] the Admiralty Court was given new jurisdiction in causes of salvage which involved arbitration,[5] and the Court's jurisdiction in salvage under the Act was extended to cover claims arising upon land as well as sea;[6] preferred ship mortgages were introduced[7] (similar to but not identical with those later introduced in the United States[8]); also all offences committed by British seamen in foreign ports were declared to be within the Admiralty jurisdiction,[9] and the Court was given the power to condemn vessels wrongfully masquerading false ownership or colours.[10]

At about this time, public attention came to be focused upon the administrative structure of the High Court of Admiralty; before discussing the particular incident responsible, however, it may be useful to look at some aspects of the two principal administrative offices of the Court.

[1] Merchant Seamen's Act, 1835, §§5, 16.
[2] Merchant Seamen's Act, 1844, §§5, 16.
[3] §§188, 189; *cf.* [U.S.] Act of July 20, 1790, c. 29, §6.
[4] §§191, 240.
[5] §§460, 464, 473; see also §§468, 492, 498.
[6] §476.
[7] Part 2, §§66–83.
[8] See Price, *L.M.L.*, p. 121.
[9] §268.
[10] §103.

Perhaps the Officer of the Court best known to the public in the present day—more so than the Judge or Registrar—is the Admiralty Marshal. And so it has been since the most ancient days of the Court's history, for in the execution of his duties as server of the Admiralty process, and in his appearances at official ceremonies witnessed by the public—whether pirate executions or splendid judicial processions—carrying upon his shoulder the great silver oar mace of the Court, he has been the figure to whom the romance of the Law and Court of Admiralty has attached. An interesting example of this symbolic personification of the jurisdiction and authority of Admiralty may yet be seen in a carved panel of the sarcophagus of the Elizabethan Admiralty Judge Dr David Lewes in the Church of St Mary, Abergavenny, Monmouthshire, depicting the Marshal of his day, Jasper Swift, carrying the silver oar.

Chief among the Marshal's duties is his responsibility for the service of process of the Admiralty Court. In modern times the Marshal has executed this duty, either personally or through his deputies, within the Port of London, service *in rem* elsewhere within the Court's jurisdiction being usually performed by officers of H.M. Customs acting as the Marshal's substitutes.[1] Confinement of the Marshal's exercise of his duties to the Port of London,[2] or 'within a circuit of five miles',[3] was certainly the rule in the nineteenth century with regard to service of process *in rem*, save in unusual circumstances,[4] but it is evident that at the time when commencement of the action *in personam* was by arrest of the person the Marshal himself executed such process within a circuit of twenty miles from London.[5]

In the nineteenth century, as today, the Marshal usually placed a member of his staff (known as a 'ship-keeper') aboard an arrested vessel of sufficient size, to prevent her from leaving the Court's jurisdiction and to protect her while in custody;[6] care of a vessel in the custody of the Court has always been the Marshal's direct responsibility, and Lord Stowell once gave a decree against the Marshal personally when property was lost from an arrested

[1] See *The Jarlinn*, [1965] 1 W.L.R. 1098, 1100.
[2] See *The Rendsburg*, (1805) 6 C. Rob. 142, 149.
[3] Coote, 1st ed., p. 136*aa*.
[4] See *id.*, p. 12.
[5] See A. Browne, vol. 2, p. 432.
[6] See R.G.M. Browne, p. 79; also *The Queen of the South*, [1968] 1 Ll. Rep. 182.

vessel, despite the Marshal's claim that his fees were not sufficient to provide a constant guard upon the ship in order to prevent waterfront predators from looting or tampering with her.[1] The Marshal's lot was later 'improved' considerably: he became salaried in 1840 at five hundred pounds *per annum*[2]—raised to seven hundred pounds by the end of Lushington's tenure as Judge;[3] moreover, the shipkeepers and others of the Marshal's staff also became salaried,[4] so that he was relieved of the burden of paying them out of his own fees; and as his duties included the appraisal and sale of vessels when decreed by the Court in actions *in rem*,[5] he was permitted to continue charging a nominal broker's fee upon such sales according to the established custom.[6]

The office of Admiralty Registrar is probably not of as great antiquity as that of the Marshal, but it has been in existence at least since 1539.[7] As the Court's chief administrative official, the Registrar's duties have been many and varied, including the control of use of the Seal of the Court,[8] the general supervision of the Admiralty Registry and matters pertaining thereto, and even, in former times, the preparation of Letters of Marque to be issued to privateers by the Lords Commissioners of the Admiralty.[9]

Perhaps the Registrar's most important duty, however, has been the exercise of his quasi-judicial function in matters referred to him by the Judge; this practice of 'reference' was well established at least by Lord Stowell's time,[10] and the basic mechanics of the reference procedure of the nineteenth century[11] have survived to the present day. Reference to the Registrar, who by custom has been assisted by two merchant assessors, might be had to determine any question of damages to be awarded to a successful suitor; such reference was usually directed following the decree of judgment as to liability,[12] though it might precede the decree in unusual cases.[13] Interestingly, some of the questions

[1] *The Hoop*, (1801) 4 C. Rob. 145.
[2] High Court of Admiralty [Fees] Act, 1840, §5.
[3] See Return to H.C. by Rothery, Adm. Reg'r., 8 May 1867, p. 3.
[4] *Ibid.*
[5] See Williams and Bruce, 1st ed., pp. 207, 233, also pp. 214–18.
[6] See Coote, 1st ed., p. 110. [7] Thompson, pp. 8–9.
[8] See McGuffie, *Notes on Letter Books*, p. 90.
[9] *Id.*, p. 17.
[10] See, *e.g.*, *The Rendsburg*, (1805) 6 C. Rob. 142.
[11] See Coote, 1st ed., pp. 64–84. [12] *Id.*, p. 64.
[13] *Id.*, p. 79.

to come before the 'Registrar and Merchants' were evidentiary as well as commercial—as in cases of collision, where a degree of fault must be applied to arrive at a quantum of damages—and this has special significance because of the jurisdiction of the referees to determine both actual and consequential damage.[1] The responsibility of the Registrar in virtually all causes heard in Admiralty has therefore been considerable, to say the least, and no less so because of the bar to attendance at references of counsel for the parties to the action.[2] It must be made clear that damages have never been *pronounced* by the Registrar and Merchants, for that is the exclusive province of the Admiralty Judge; but 'confirmation' by the Judge of the report given to him by the Registrar at the conclusion of a reference has been normal, though the Judge might modify any such report upon due objection by the adverse party with support of affidavits.[3] Such references were until 1959 conducted upon payment of a fee,[4] which in Dr Lushington's time was £5 5s., to each of the referees.[5]

The Registrar has also conducted—with the parties' lawyers in attendance—the taxation of the costs of each action, with a report given to the Judge as upon a reference, confirmed subject to objection.[6] In addition to these duties, the Registrar was at one time empowered to sit as surrogate for the Judge, and so was occasionally responsible for the entire function of the Admiralty Court.[7]

The Admiralty Registrar has been, almost without exception, a key figure in the Court's development; thus some holders of the office have made direct contributions to progress in addition to the dutiful execution of their responsibilities, taking the form of a zealous crusade for the reform of procedure,[8] the production of a better-informed Admiralty Bar through the publication of highly authoritative works on the Law and the jurisdiction and practice of the Court,[9] or the enrichment of scholarship through research into the history of the Admiralty Court and its personnel.[10] These positive contributions of Admiralty Registrars have

[1] See Coote, 1st ed., p. 71.
[2] See *id.*, p. 65. [3] *Id.*, pp. 84–5.
[4] McGuffie, *Notes on Letter Books*, p. 83. [5] Coote, 1st ed., p. 136n.
[6] *Id.*, p. 87. [7] See Thompson, pp. 8–9.
[8] *E.g.*, H.C. Rothery; see *infra*, p. 54.
[9] E.S. Roscoe and K.C. McGuffie; see Bibliography.
[10] E.S. Roscoe, G.H.M. Thomson, and K.C. McGuffie; see Bibliography.

had a telling effect upon the evolution of the court and the Law. It is unfortunately true, however, that negatives may be as effectual as positives in producing change—and historical objectivity demands that, amongst these positive efforts, there must by noted a rather intriguing negative.

When Charles George Perceval, Lord Arden, died in 1840 at the age of 84, he had been Admiralty Registrar for exactly fifty years—the longest known tenure of the office. Arden had received the appointment as a plum of Royal patronage, and he became a man of standing, influence (his younger brother, Spencer Perceval, was Prime Minister from 1809 to 1812) and considerable wealth. This last attribute is principally explained by the fact that Arden held the Registrarship during a period of great naval warfare, and at the peak of this his official remuneration from fees generated by Prize causes exceeded ten thousand pounds *per annum*; though the Registrar then had to bear the expense of maintaining the Registry and its staff, the years of Prize adjudication provided a very substantial balance.[1] Of course, not only the Registrar, but also the other Court officials were remunerated by fees; the Admiralty Marshal at this time was pocketing about £10,000 yearly,[2] and what Lord Stowell's income as Judge was may be imagined. In addition to fees, however, the Registrar also received as an emolument the interest derived from the investment of suitors' money paid into the fund of the Court.[3] Two rather feeble legislative attempts[4] to place some restrictions upon Arden's windfall proved wholly abortive, and it was not until a month after his death in 1840 that remuneration of Court officers by fee was abolished and salaries payable out of the Consolidated Fund substituted, providing a salary of £1,400 *per annum* for the Registrar.[5]

The reasons for the lack of success in controlling the Registrar's income during the period of Prize adjudication may probably be correctly described as political; but in all likelihood nothing was thereafter done until 1840 because the Prize business vanished, and the income from fees collected on the small volume of instance business was so insignificant as to eliminate controversy.

[1] Thompson, pp. 13, 14.
[2] *Id.*, p. 16. [3] *Ibid.*
[4] Registrars of Admiralty and Prize Courts Act, [1]1810. Registrars of Admiralty and Prize Courts Act, [2]1813.
[5] High Court of Admiralty [Fees] Act, [1]1840, §2.

The man most affected by the substitution of a set salary for remuneration by fees was naturally Lord Arden's successor, one Henry Birchfield Swabey—who had been appointed a Deputy Registrar by Lord Stowell in 1810[1] and who drafted the 1840 Fees Act, under §2 of which he became Admiralty Registrar.[2] Swabey (not to be confused with Dr M. C. M. Swabey, Reporter of the Court from 1855 to 1859) performed his duties as Registrar with a degree of flamboyance which must have been somewhat unsettling to those accustomed to the aged Lord Arden, but the new Registrar seemed to be acceptable to Dr Lushington, who as a Member of the Commons could not have been much delighted that for two years as Judge his former Registrar had sat above him in the House of Lords.

All went well until the discovery in November, 1853, of large defalcations in the accounts of the Admiralty Registry.[3] Swabey thereupon executed a characteristically formal and elaborate 'proxy of resignation' which he arranged to have delivered to the Judge,[4] having meanwhile gone abroad—'address unknown'[5] (though South America has been rumoured)—which absence evidently became permanent, despite the interest in locating him shown by the Inspector General of Inland Revenue and others.[6] Though it came as a shocking revelation to the public by the Committee of the House of Commons appointed to investigate the 'Misappropriation of Monies entrusted to Mr. *H. Swabey*, late Registrar of the High Court of Admiralty' that Swabey took £26,700 from the Crown Fund, £29,516 from the Suitor's Fund,[7] and in all appeared to have embezzled in excess of £75,000,[8] there should have been some indications of matters amiss to those closely associated with the ex-Registrar. For (1) Swabey officially took the leases to the Registry premises in his own name, and for some time prior to his disappearance he had not paid the rent to Dr Addams, the landlord, who had threatened to sue for the arrears;[9] (2) Swabey had borrowed £1500 from a Junior Clerk in the Registry, which he had not repaid;[10] and (3), it must have been fairly general knowledge that for a good while Swabey had

[1] Thompson, pp. 16, 18.
[2] *Id.*, p. 18.
[3] McGuffie, *Notes on Letter Books*, p. 10.
[4] Thompson, p. 19.
[5] See McGuffie, *Notes on Letter Books*, p. 79.
[6] *Ibid.*
[7] See Parl. Paper [1854] (521) xlii (H.C., 6 July).
[8] See McGuffie, *Notes on Letter Books*, p. 71.
[9] *Id.*, p. 15.
[10] *Id.*, p. 71.

been conducting a proctor's business in the Admiralty Court under his son's name, collecting all the fees himself.[1]

However Swabey secured his appointment as Deputy Registrar in 1810, he came into that post at a time when the income of the Registrar, which Lord Arden evidently shared with his Deputies,[2] has never been greater—and the end of the Prize business, with the consequent drop-off in fees, must have come as a shock to him. How he survived the next twenty-five years is something of a mystery, but at Arden's death he was the sole Deputy,[3] and the post of Deputy Registrar was abolished by the 1840 Fees Act, which Swabey himself drafted.[4] From this, one may conjecture that, owing to Arden's advanced age, Swabey had for some time prior to his succession to the post been Registrar in fact if not in name, and that he was determined once he became Registrar not to share responsibility for financial matters, a suspicion strengthened by the fact that although an Assistant Registrarship was provided by the 1840 Fees Act, Swabey never requested the appointment of such an officer.[5]

In the end, only £2000 of the embezzled funds[6] were recovered, and a sum in compensation of the balance was voted by Parliament in 1855.[7] Perhaps the final irony of *l'affaire* Swabey, however, is that he himself drafted the statutory provision for the removal of an Admiralty Registrar,[8] a proceeding which he adroitly avoided by his 'proxy of resignation', and which in fact was never utilized.

Hardly a greater contrast can be imagined between Swabey and his successor, H. C. Rothery. Even under the burden of Swabey's 'shameful neglect of duty in every department of the Office',[9] Rothery was able to clean up matters in the Registry within a comparatively short time. The Court quickly emerged from the gloom of scandal—not only to the relief of the civilians, but also to that of the common lawyers, who had come to view the Admiralty jurisdiction as well established, and its Court as one of extreme competence.[10] An official reaction to Swabey's thievery was,

[1] McGuffie, *Notes on Letter Books*, pp. 75–6.
[2] Thompson, p. 14. [3] *Id.*, p. 18.
[4] *Ibid.* [5] *Id.*, pp. 18, 19.
[6] See McGuffie, *Notes on Letter Books*, p. 129.
[7] See *id.*, p. 74.
[8] High Court of Admiralty [Fees] Act, 1840, §3.
[9] Rothery in McGuffie, *Notes on Letter Books*, p. 129.
[10] See *e.g.*, *Place v. Potts*, (1855) 5 H.L.Cas. 383.

however, quite inevitable; this took the form of a statute which, while its greater bulk dealt with needed reforms of evidentiary procedure and administration of oaths, nonetheless had as an avowed purpose the substitution of stamps in lieu of fees[1] in order to prevent the possibility of any future mismanagement. Two other notable features of the 1854 Court Act, in passing, were the introduction of a penalty for perjury identical to that at common law,[2] and the introduction of the proceeding by *monition*,[3] which will shortly be discussed as a separate matter.

The problem of unwieldy procedure now began to press upon the Admiralty Court. In America, Congress had renewed over a decade previously the power of the U.S. Supreme Court to make rules of procedure for causes in the District and Circuit Courts,[4] and that was followed, in 1845, by the promulgation of the first Admiralty Rules,[5] authored just prior to his death by Mr Justice Story.[6] While these rules were largely the codification of previously accumulated customs,[7] they did clarify important points such as the joinder of actions *in rem* and *in personam* in the same libel, expressly forbidding such dual actions against both ship and owner,[8] though later rules have reversed this position.[9] It ought here to be made clear that the libel in American Admiralty corresponded to the old Bill in Chancery in England[10] rather than to the English libel, which began to fall into disuse in the High Court of Admiralty with the growing tendency, after Lord Stowell's time, to utilize the truly summary procedure.[11] Basically, however, the Admiralty practice of the English and American Courts remained quite similar until 1855,[12] and on account of this similarity, Admiralty practitioners and textwriters in the United States kept (as they still keep[13]) a reasonably close eye upon the development of the Law and practice of Admiralty in England. Owing to this, and perhaps to a degree of smugness

[1] Admiralty Court Act, 1854, preamble.
[2] Admiralty Court Act, 1854, §9.
[3] Admiralty Court Act, 1854, §13.
[4] Act of August, 23, 1842, *c.* 188; see Wiswall, 'Procedural Unification,' p. 38.
[5] See Conkling, p. 785. [6] Roberts, p. 64.
[7] Conkling, p. 353. [8] Parsons, pp. 376, 378.
[9] See F.R.C.P. [1 July 1966], Adm. Rule C. (1) (b).
[10] See Conkling, p. 417. [11] *Id.*, p. 564.
[12] See Dunlap, pp. 92–115.
[13] See *e.g.*, dissent of Frankfurter, A. J., in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 551 (1960).

because of the recent codification of rules there, a leading American Admiralty textwriter of that day—viewing the situation in England—was moved to comment that:

> Strange as it may seem, it appears . . . by the very latest Reports which have reached us, of the decisions of the High Court of Admiralty, that its practice, in many particulars, is still uncertain and fluctuating. Indeed, it may reasonably be inferred from the confused, obscure, and, in some respects, nonsensical statements rather ostentatiously introduced by MR CHITTY on the subject, in the second volume of his General Practice, that this knowledge is but little less inaccessible to an English lawyer habituated only to the practice of the common law courts.[1]

Whether this or similar observations were instrumental in provoking action in England, the needed reform was embarked upon shortly after Rothery's appointment as Registrar, and there seems little doubt that he was not merely, as has been stated by a contemporary, an 'associate' of Dr Lushington's in procedural reform,[2] but in reality was the *primum mobile*—Lushington having had the power since 1840 to initiate reform by making and/or repealing rules of procedure in the Court,[3] yet having done nothing at all in this regard until Rothery became Admiralty Registrar.

It has been said that the first formal Admiralty Rules were those of 1859,[4] but in fact the Rules of 1855 were the first attempt at a reform of practice, and even earlier Rules, dealing with extra Court days, had been promulgated in the previous year.[5] The 1855 instance Rules were divided into two parts, one dealing with fee procedures designed to implement the 1854 Court Act by substituting the sale of stamps for the receipt of cash, and the other dealing primarily with Court proceedings. In this latter section, certain procedures are worthy of particular note: (1) an instrument was designed to facilitate consideration of technical evidence by the Trinity Masters, and to prevent 'manufactured' defences,[6] to be given in prior to any pleadings, by each party, in any cause of collision; these 'Preliminary Acts' were to be sealed statements of all pertinent factual particulars surrounding the collision, such as time, place, courses, state of sea, etc., and were

[1] Conkling, at p. 381, n. (*a*).
[2] Admiralty Court Act, 1840, §18.
[3] Coote, 1st ed., intro., pp. vi–vii.
[4] Roscoe, *Studies*, pp. 3–4.
[5] Rules, Orders & Regulations, 1854 (O.-in-C. of 3 July).
[6] *Papers on 1855 Rules*, p. 12.

to remain sealed in the Registry until conclusion of the pleadings[1] [with minor modifications, the form of the Preliminary Act established in the 1855 Rules remains today the same[2]]; (2) secret examination of witnesses[3] was abolished in preference to examination with the parties' proctors in attendance,[4] though the questioning was still to be done by the Registrar or a commissioned examiner [the presence of parties themselves was still generally forbidden[5]]; (3) pleadings and proofs in all contested cases were required to be printed before the hearing,[6] an innovation of greater significance than might be supposed, and one which will be discussed in the next chapter. The balance of the 1855 instance Rules dealt with examination and transcription of evidence given at hearings or references, obviously designed mainly to expedite Court proceedings, thus continuing the progress toward a more summary procedure.[7] Oddly enough, two new points of Court procedure were also introduced in the section of the 1855 Rules dealing with instance fees, one establishing the use of the *caveat warrant book*, which will be dealt with at a later stage in this work, and the other requiring notice of any motion to be given in to the Registry at least two days prior to making the motion in Court.[8]

Portions of the 1855 Rules were obsolete even upon their promulgation; the primary reasons for this were a tremendous increase in the Court's instance business since the 1840 Act[9]—due not only to the Court's expanded jurisdiction but also to the new vitality of maritime commerce generated by steam navigation—and the breaking of the civilian monopoly of Admiralty practice by the common lawyers.[10] A fresh start was needed, replacing the ancient and now unworkable method of evidence by deposition with a better system; the answer, appropriately enough, was to permit the introduction of oral evidence as at common law—and so in 1859 the 1855 Rules were repealed and

[1] 1855 Instance Rules [Rules, Orders & Regulations, 1855 (O.-in-C. of 7 December)], r. 2.
[2] See McGuffie *et al.*, *Practice*, §672, p. 298; also *The Judith M.*, [1968] 2 Ll. Rep. 474, 485.
[3] See *Papers on 1855 Rules*, p. 12.
[4] 1855 Instance Rules, r. 6.
[5] 1855 Instance Rules, r. 7.
[6] 1855 Instance Rules, r. 10.
[7] 1855 Instance Rules, rr. 3–5, 8, 9.
[8] 1855 Instance Fee Rules [Rules, Orders & Regulations, 1855 (O.-in-C. of 11 December)], rr. 4, 15.
[9] See *infra*, pp. 57–8.
[10] High Court of Admiralty Act, 1859.

replaced by a streamlined Court procedure which made oral examination of witnesses in open Court a principal feature.[1]

The outlines of the Admiralty procedure of Dr Browne's day were preserved by the 1859 Rules, but some innovations were: (1) the repeal of the old default proceeding, replacing it with a four-step procedure which gave a hearing and final decree within six days of a sale by the Court;[2] (2) a change in the form of the warrant of arrest *in rem*, permitting the Marshal to cite the interested parties wherever found, rather than at a specifically stated place;[3] (3) the introduction of a separate *citation in rem* for service upon vessels already under arrest, to replace subsequent warrants for subsequent actions *in rem*;[4] (4) the inclusion of the descriptive term 'vessel' in affidavits to lead warrants, in order to avoid bad warrants resulting from misdescription of the rig of the ship to be arrested;[5] (5) the introduction of the 'detainer' [order for detention] to restrain the *res* from leaving the Court's jurisdiction for up to three days pending arrest;[6] and (6) a new form of subpoena, directed to the subpoenant (to replace the old 'compulsory' which was directed to the Marshal)—which itself shows the increasing tendency to introduce common law procedures.[7] Indeed, it was observed by an Admiralty textwriter of the day that the 1859 Rules 'preserved those original peculiarities of the Court which were its excellences and its boast . . . , whilst approximating the practice in Admiralty to the more elastic procedure of Common Law . . .'[8]

Though new procedures had been devised to expedite business in the Court, the effect of custom proved difficult to shake off. Thus the proceeding by 'act on petition' came into being to replace that by 'plea and proof', which had become limited in use to causes of collision and bottomry;[9] but while an 'original act' in the proceeding by act on petition went beyond the old libel in requiring a statement of the plaintiff's entire case, and the new answer required inclusion of all defenses—at which stage the introduction of new matter was barred—the pleadings could still

[1] 1859 Rules [Rules, Orders & Regulations, 1859 (O.-in.-C of 29 November)], rr. 4(3), 78.
[2] 1859 Rules, rr. 18–26.
[3] 1859 Rules, form 5.
[4] 1859 Rules, form 10; Coote, 1st ed., p. 136*cc*.
[5] See Coote, 1st ed., p. 241.
[6] 1859 Rules, r. 15, form 8.
[7] 1859 Rules, form 42.
[8] Coote, 1st ed., intro., p. vii.
[9] *Id.*, p. 39.

drag on through a reply, rejoinder (in which the defendant had one final opportunity to state material facts), surrejoinder, rebutter and surrebutter.[1] It is also not clear whether in causes of collision the new 'Preliminary Act' immediately superseded the old 'protest'; here the new procedure was a clear improvement upon the old, for the protest, an ancient procedure[2] which made a statement of the factual circumstances surrounding the mishap given by the master after making port—based upon the log-book plus the recollections of officers and crew[3]—was admissible in evidence only when introduced by the opposing party to contradict the testimony of the owners or master,[4] admissible even if unsworn,[5] and introduceable at option rather than being required—though if not introduced, the Judge might properly infer that it would not have supported the allegation.[6] The protests of both vessels could be directed to be brought in upon application by either party, however, if the cause was to proceed by plea and proof rather than act on petition.[7] Protests made long after the collision or act of salvage[8] were also admissible, though given little weight unless supported by subsequent proofs.[9]

Despite the availability of oral testimony at the hearing upon application of either party or by independent order of the Court,[10] it seems that *viva voce* examination appeared even more unpalatable to many witnesses than examination by deposition and affidavit, and on occasion the 'threat' of issuance of a subpoena to testify orally in Court was used to persuade the prompt execution of an affidavit.[11] But the widening of opportunity for the use of oral testimony probably stands, in retrospect, as the most notable feature of the 1859 Rules, for in the following decade oral evidence became the general rule rather than the exception.[12]

The broader Admiralty jurisdiction granted by the 1840 Court Act was immediately effective in bringing a greater volume of

[1] Coote, 1st ed., p. 51.
[2] *The Belgenland*, 36 F. 504, 507 (S.D.N.Y. 1888).
[3] See Coote, 1st ed., p. 53 & n. (*z*); also Abbott, p. 575.
[4] *Ibid.*
[5] *The Mellona*, (1846) 10 *Jur.* 992, 994.
[6] Coote, 1st ed., p. 55.
[7] *Ibid.*
[8] *Ibid.* [see also 50 *L. Mag.* 57, 66–69 (1853)].
[9] *Id.*, pp. 54, 53.
[10] *Id.*, pp. 57–8.
[11] See, *e.g.*, *The Glory*, (1849) 7 Not. Cas. 263; 13 *Jur.* 991.
[12] See Williams and Bruce, 1st ed., p. 260; *cf. The Syracuse*, 23 Fed. Cas. 594 (No. 13718) (C.C.S.D.N.Y. 1868).

business before the Court, in which a total of 228 causes were instituted during 1841; but the number had so increased by 1860, in which year 562 causes were instituted,[1] that the case for an Admiralty jurisdiction truly comprehensive of maritime matters became undeniable. A bill, which was largely authored by Dr Lushington,[2] was introduced in 1861 to amend and generally enlarge the Admiralty jurisdiction, and after considerable debate the Admiralty Court Act, 1861, emerged as law. By this Act the Admiralty Court was finally constituted a Court of Record,[3] and the Court was given jurisdiction for the first time directly to entertain petitory as well as possessory suits involving vessels registered in England or Wales,[4] though the Court later came to give the territorial requirement a strict interpretation[5] more typical of the early nineteenth century.[6] Jurisdiction was given over claims for building, equipping or repairing a vessel if ancillary to an action *in rem*,[7] over masters' claims for disbursements,[8] over all claims upon mortgages of registered ships,[9] and, in partial vindication of Nicholl's judgment in *The Neptune*,[10] over all claims for necessaries supplied by materialmen to foreign ships, unless supplied in their home ports.[11] Admiralty was also finally given by this Act an original jurisdiction concurrent with that of Chancery regarding claims arising from the transfer of ownership of ships or shares therein, where of British registry,[12] and in limitation of liability, ancillary to actions *in rem*.[13] Jurisdiction to entertain life salvage claims was also extended to cases involving British vessels wherever occurring, and involving foreign vessels in British territorial waters.[14]

It is interesting to note that while causes of civil salvage sued upon in Admiralty following the sweeping grant of salvage jurisdiction in the 1840 Court Act[15] continued for a time to outnumber collision suits, the number of salvage suits did not generally increase in the years 1841–61, whereas the entered number of

[1] Return to H.C. by Rothery, Adm. Reg'r., 28 May 1867, No. 1.
[2] See Hansard, vol. 161 [H.L. Deb.], cols. 1394–97, 5 March 1861.
[3] §14. [4] §8.
[5] See *The Robinsons* and *The Satellite*, (1884) 5 Asp. 338.
[6] See *The Barbara*, (1801) 4 C. Rob. 1.
[7] §4. [8] §10. [9] §11.
[10] See *supra*, p. 38.
[11] §5. [12] §12. [13] §13.
[14] §9.
[15] Admiralty Court Act, 1840, §4.

collision causes (perhaps a by-product of the steamship era) rose consistently in that period, surpassing salvage suits in the years after 1852, and outnumbering them by more than half in 1860.[1] Since the Court by 1860 had jurisdiction to entertain any claim whatever for civil salvage,[2] there was a clear case for giving equally broad jurisdiction in an area of even greater activity, collision. The simple language of the 1861 Act therefore granted jurisdiction over any claim for damage done by any ship.[3] Even the sharp-eyed guardians of the interests of the common law, who objected vociferously to some features of the bill, could not have guessed the extent to which §7 would eventually enlarge the Admiralty jurisdiction—giving the Court cognizance, for example, of causes of collision arising within the body of a county,[4] of negligent damage to submarine cables,[5] and of damage done to a wharf located in a foreign country.[6] Without doubt, §7 has proven the most important and valuable grant in the 1861 Act.

The 1861 Act also gave decrees and orders of the Admiralty Court for the payment of money the same effect as a judgment at common law,[7] permitted the concurrent hearing of counterclaims,[8] permitted appeal upon the original bail and from interlocutory decrees,[9] gave power to the Judge to enforce discovery before trial as in any of the Superior Courts of common law,[10] extended service of subpoenas throughout the United Kingdom,[11] permitted the Judge to order a party evading service to proceed as if served,[12] and constituted the Registrar sole surrogate.[13]

As earlier indicated, passage of the 1861 Act was not secured without opposition from a faction which still viewed any extension of the Admiralty jurisdiction as a threat to the common law. Though not so blunt in stating their views as Mr Justice Johnson had been in the United States,[14] they were candid in their abhorrence of nautical assessors[15] and the absence of a lay jury; indeed, this latter factor was so rankling to them that one notable article

[1] Return to H.C. by Rothery, Adm. Reg'r., 28 May 1867, No. 1.
[2] Abbott, p. 998. [3] Admiralty Court Act, 1861, §7.
[4] *The Malvina*, (1862) 6 L.T.R. 369.
[5] *The Clara Killam*, (1870) L.R. 3 A. & E. 161.
[6] *The Tolten*, [1946] P. 135. [7] §15.
[8] §34. [9] §§33, 32. [10] §17.
[11] §21. [12] §20. [13] §25.
[14] See *Ramsay v. Allegre*, 12 Wheat. (25 U.S.) 611, 614 (1827).
[15] See, *e.g.*, 10 *L. Mag. & Rev.* (n.s.) 262, 267 (1861); also 50 *L. Mag.* 57, 70–1 (1853).

of the day, labelling the view of the non-jury school 'perverted', went even so far as to advocate the extension of jurisdiction by the bill, then under consideration by Parliament, *provided that* a scheme of jury trials was introduced into Admiralty to replace nautical assessors.[1] In effect, nothing less was sought by this faction than a conversion of the Admiralty Court to a court of common law. They could not have been much encouraged by Dr Lushington, whose views on the independence of the Admiralty Court were well known,[2] and who was the author of most of the 1861 provisions; but it seems, from the account of the debate upon the bill in the Lords,[3] that those who favoured retention of the proceeding in Admiralty without jury trial, as well as an extension of jurisdiction, may have had to sacrifice some desired provisions such as an unrestricted materialmen's lien and appeal of judgments solely on the questions of law involved, in order to preserve that portion of the *status quo*.

Though in general the tendency during Dr Lushington's period of service as Admiralty Judge was towards a gradual expansion of the jurisdiction of Admiralty, there were a few reverses. Some of these were, in a sense, judicial frustration rather than retrogression. Thus Dr Lushington felt that he could not entertain a suit for general average, because historically the common law had retained an exclusive jurisdiction over such questions,[4] though the common law courts soon after came to recognize a limited ancillary Admiralty jurisdiction over questions of freight and average;[5] Lushington also felt compelled to observe the pronouncements of common law courts as to the territorial jurisdiction of Admiralty[6] where a question of Admiralty jurisdiction conferred by statute was involved.[7] There was, however, some actual retrogression written into the 1861 Court Act to remove from Admiralty cognizance any claims for cargo damage against English or Welsh shipowners;[8] and with the increase in 1862 of the maximum jurisdictional limit of salvage claims made cognizable in 1854 by Justices of the

[1] 'Prospects of the Admiralty Court', 10 *L. Mag. & Rev.* (n.s.) 262, 264, 267 (1861).
[2] See, *e.g.*, *The Clarence*, (1854) 1 Sp. 206, 209.
[3] Hansard, vol. 161 [H.L. Deb.], cols. 1394–7, 5 March 1861.
[4] *The Constancia*, (1846) 2 W. Rob. 487.
[5] See *Place v. Potts*, (1855) 5 H.L.Cas. 383.
[6] See, *e.g.*, *General Iron Screw Collier Co. v. Schurmanns*, (1860) 1 J. & H. 180, 193.
[7] See, *e.g.*, *The Johannes*, (1860) Lush. 182. [8] §6.

Peace from two hundred[1] to one thousand[2] pounds, and extension of this jurisdiction to claims arising outside the United Kingdom,[3] the Admiralty Court as a practical matter lost its jurisdiction (though perhaps willingly) in causes of salvage involving under £1000.

On balance, these restrictions of jurisdiction were more than compensated by other grants. The power of the High Court of Admiralty to issue letters patent appointing Judges, Registrars, Marshals and other officers of Vice-Admiralty Courts was statutorily affirmed in 1863[4]—not because of any difficulty in England, where the office of Vice-Admiral had become purely honorary by mid-nineteenth century[5]—but to put an end to the improper execution of certain offices in Vice-Admiralty Courts abroad, which had been filled without the correct authorization of the Lords Commissioners or patent from the High Court of Admiralty.[6] At the same time, jurisdiction was given to the Court to hear appeals of excessive charges by practitioners in Vice-Admiralty Courts.[7]

The Court's jurisdiction over cases of wilful disobedience of masters under naval convoy was made exclusive and new Prize jurisdiction was also given, by an Act of 1864,[8] and another statute of the same year conferred exclusive jurisdiction upon the Court over questions of distribution of Royal Navy salvage, bounty or prize monies, and an indirect jurisdiction to determine the apportionment of monies among Navy Ships' Agents;[9] in 1866 the Court gained jurisdiction over suits by merchants, shipowners or other interested parties against Officers of naval convoys for dereliction of duty and/or negligent damage,[10] bringing to a conclusion this series of enactments giving the Court naval business. Much of this legislation arose out of experiences and aftermaths of the Crimean War, which generated a good deal of diverse business in the Court, including applications by

[1] Merchant Shipping Act, 1854, §460.
[2] Merchant Shipping Act Amendment Act, 1862, §49; *cf.* Coote, 2nd ed., pp. 4–5.
[3] Merchant Shipping Act Amendment Act, 1862, §49.
[4] Vice-Admiralty Courts Act, 1863, §7.
[5] See McGuffie, *Notes on Letter Books*, p. 98. [6] *Id.*, p. 96.
[7] Vice-Admiralty Courts Act, 1863, §19.
[8] Naval Prize Act, 1864, §§46, 52.
[9] Naval Agency and Distribution Act, 1864, §§22, 20.
[10] Naval Discipline Act, 1866, §30.

shipowners for compensation from the Royal Navy to cover the desertion of seamen, whom the owners alleged to have volunteered into the Navy.[1]

Other business came to the Court as a result of earlier statutory jurisdiction, such as that given by the 1840 Court Act over questions of distribution of booty captured on land[2] (a jurisdiction evidently exercised by the Admiralty Court during the eighteenth century[3]), the most notable exercise of which involved booty captured by the British Army at Banda and Kirwee, in India.[4] Equally, Dr Lushington lost no time in giving the fullest application to new statutes, and held collisions in foreign waters cognizable under §7 of the 1861 Court Act in the year following its passage;[5] it might be mentioned as well that in collisions within British territorial waters the Court since 1846 had enjoyed the advantage, in deciding fault, of a statutory application of the Trinity House collision rules.[6]

One provision of the 1861 Court Act which was of considerable practical importance permitted all of the jurisdiction conferred by the Act to be exercised either *in rem* or *in personam*.[7] And yet this seems at first a puzzling step, for the action *in personam* previously described by Browne (commencing with the arrest of the body of the defendant) had earlier been declared by Dr Lushington to be long obsolete—not having been employed, in fact, since the eighteenth century, to the best of his recollection,[8] though still technically capable of use even during Lushington's judgeship;[9] it is hardly surprising, however, that where its revival was mentioned as a possibility it was promptly condemned as a 'most offensive' suggestion, especially after the abolition at common law of arrest on mesne process.[10] At some time in the eighteenth century, prior to Stowell's judgeship, an answer to this seeming dilemma began to evolve; in the exercise of its prerogative power, and in the tradition of the civil law, the Court

[1] See McGuffie, *Notes on Letter Books*, p. 110.
[2] Admiralty Court Act, 1840, §22.
[3] See *LeCaux v. Eden*, (1781) 2 Doug. 594, 613.
[4] *The Banda & Kirwee Booty*, (1866) L.R. 1 A. & E. 109; *subs. proc.* (1875) L.R. 4 A. & E. 436.
[5] *The Diana*, (1862) Lush. 539.
[6] Steam Navigation Act, 1846.
[7] Admiralty Court Act, 1861, §35.
[8] *The Clara*, (1855) Swab. 1, 3.
[9] *The Alexander*, (1841) 1 W. Rob. 288, 294.
[10] Coote, 1st ed., p. 131.

began to *monish* [command] defendants to appear on pain of contempt, rather than to issue warrants *in personam* for their arrest.

The instrument for effecting such a command was known as a *monition*, a process exclusive to the civil law, which was addressed to the Marshal and commanded him to cite the defendant personally and admonish him to appear and answer.[1] While the original purpose of the monition was to command the performance of any act which could be ordered by the Court (somewhat in the fashion of a mandatory injunction in Equity), and while Browne makes no mention of the monition as an instrument for bringing defendants before the Admiralty Court, Lord Stowell certainly showed no hesitancy in issuing monitions to appear in cases where an action *in rem* was precluded; thus a monition was issued to recalcitrant shipowners to appear and show cause why salvage should not be decreed against them, where at their request the salvors had refrained from arresting the salved vessel;[2] and where an action *in rem* seemed possible, Stowell appears occasionally to have utilized the monition in preference to a warrant of arrest.[3] Actions brought upon claims against Crown vessels or wrongdoing vessels subsequently lost were evidently routinely commenced by monition,[4] though the process in the latter instance could only be employed where the owners were domestic residents.[5] Certainly by the time of Sir John Nicholl the procedure was very well established in cases of the absence of the *res obligata* from the Court's territorial jurisdiction.[6]

The appearance of the monition in the 1854 Court Act[7] as a mode of initiating Admiralty causes alternate to the warrant of arrest merely codified the pre-existing practice,[8] rather than offering a new action *in personam*. Indeed, it ought to be noted that, though the monition was directed to a specifically described or named person, was personally served, and terminated in a personal judgment—assuming that the action thereby instituted enjoyed a successful prosecution—its use under the 1854 Court Act seems to have been confined to cases in which an action *in rem*

[1] *Black's Law Dictionary*, p. 1158.
[2] *The Trelawney*, (1801) 3 C. Rob. 216 *n*.
[3] *E.g.*, *The Governor Raffles*, (1815) 2 Dod. 14, 15, 17.
[4] See Coote, 1st ed., p. 132.
[5] *The Carlyle*, (1858) 30 *L.T.* 278.
[6] See *The Meg Merrilies*, (1837) 3 Hag. Adm. 346.
[7] Admiralty Court Act, 1854, §13.
[8] Coote, 1st ed., p. 132.

might have been available,[1] and even in actions prior to that time which had been commenced by monition in the absence of the *res*, the form of an action *in rem*—even to the name of the ship in the title of the cause—seems to have been emulated.[2] Indeed, although very highly respected authorities have stated that the monition was used to commence actions *in personam*,[3] it appears that this is an incorrect observation because (1) there seems to be no authority to the effect that the monition was an alternative to a warrant for the arrest of the *corpus*, but authority has been shown to establish its use as an alternative to a warrant for the arrest of the *res*; and (2), disobedience of a monition could not result in default judgment, whereas disobedience of its eventual replacement, the *citation in personam*,[4] served in the same manner as a monition,[5] resulted in a personal default judgment,[6] rather than a contempt.[7]

While it is true that the monition was aimed at and had its effect upon the person, it was nonetheless an adjunct to the action *in rem*,[8] and so it seems better to speak of 'a personal action by way of monition', rather than 'an action *in personam* by monition'. However, it must then be said that the personal action by way of monition was probably the forerunner of the modern action *in personam*, for it bears more resemblance to the post-1859 action *in personam* by citation than to the pre-1859 action which commenced with personal arrest. In American Admiralty, the monition became in fact a personal summons,[9] and though it is said that the 1859 English *citation in personam* incorporated the old monition to appear and answer,[10] its penalty of default for disobedience shows it as a direct successor to the old warrant *in personam*. All personal actions after 1859 were commenced by the *citation in personam*, the contemplated process for the actions *in personam* specified in the 1861 Court Act.[11]

The 1859 Rules did not, however, put an end to the use of the monition in the Admiralty Court, for its original function was never lost, and at the time it was being used to institute personal

[1] See Admiralty Court Act, 1854, §13.
[2] See, *e.g.*, *The Meg Merrilies*, (1837) 3 Hag. Adm. 346.
[3] *I.e.*, Williams and Bruce, 3rd ed., p. 321; Roscoe, *Practice*, p. 184.
[4] 1859 Rules, r. 28.
[5] See Coote, 1st ed., p. 136*dd*.
[6] See 1859 Rules, form 17.
[7] For further details, see *infra*, pp. 166–7, 198.
[8] See *supra*, pp. 62–3.
[9] See Conkling, p. 486.
[10] Coote, 1st ed., p. 136*dd*.
[11] Admiralty Court Act, 1861, §35; see also §20.

actions, it was still being used as well to enforce orders of the Court upon pain of contempt. It was applicable to those who incited disobedience[1] in addition to those who actually disobeyed, and with reference to the former the Court was 'generally slow and reluctant to release the offenders until they have undergone some term of imprisonment.'[2] Prior to the 1861 Court Act, monitions for personal attachment [arrest] and/or committal were also the only available tool of the Court for obtaining the satisfaction of personal judgments.[3] The 1861 Act gave the Admiralty Court the power to issue writs for the execution of judgments as at common law,[4] but personal attachment under monition continued to be the chief mode of execution thereafter under §15 of the 1861 Act,[5] and this use of the monition survived Dr Lushington's tenure as Judge.

Other procedural provisions of the 1861 statute had a more immediate effect. The simultaneous hearing of counterclaims and cross-actions under §34 soon became a regular feature of Admiralty practice, and some cross-actions went on to the Privy Council as cross-appeals.[6] Pre-hearing discovery of documents, a practice which originated in the civil law,[7] was made easier by power given to the Judge in §17 of the 1861 Court Act, and Dr Lushington in at least one subsequent case even made an order under §17 for the production to him of documents claimed to be privileged, in order to enable him to decide an application by the opposing party for leave to inspect them prior to the close of pleading.[8]

Though the general outline of Admiralty procedure during Lushington's judgeship remained nearly identical to that of Lord Stowell's, there were a few features—apart from those already discussed—which seem to have emerged gradually; the majority of these were terminological changes, unworthy of specific mention; one, however, the *praecipe*[9] [authorization

[1] *The Bure*, (1850) 14 *Jur.* 1123.
[2] Coote, 1st ed., at p. 19.
[3] See Williams and Bruce, 3rd ed., p. 336.
[4] Admiralty Court Act, 1861, §22.
[5] See, *e.g.*, *The Zephyr*, (1864) 11 L.T.R. 351.
[6] See, *e.g.*, *The Saxonia* and *The Eclipse*, (1862) Lush. 410.
[7] See Williams and Bruce, 1st ed., p. 304.
[8] *The Macgregor Laird*, (1866) L. R. 1 A. & E. 307.
[9] *Cf. R. D. Wood Company v. Phoenix Steel Corporation*, 327 F. 2d 921, 923 (3 Cir. 1964).

form], seems to have been an innovation. It is most likely that the praecipe was an outgrowth of the changes in the procedures for the collection of Court fees, and its extensive use may ultimately have been a direct result of the Swabey affair, for each step in any proceeding thereafter required for its institution the filing of a praecipe upon which the proper fee stamp had been affixed; thus the method of instituting a suit in Admiralty changed from the 'entry of an action' in the 'action book',[1] to the filing of a 'praecipe to institute' the cause, and its entry in the 'cause book',[2] which, as all of these steps continued to take place in the Registry, may have been the 'action book' under a new name. In like manner, it was necessary to file a 'praecipe for a warrant' in addition to the affidavit to lead, a 'praecipe for service', a 'praecipe for notice of sale', etc.,[3] in order to enable the subsequent steps to be taken. Some praecipes also served an informative function as to the next step in the action; appearance, for example, was accomplished by filing a 'praecipe to enter an appearance', but if it was desired to appear under protest, it was necessary to file a praecipe which stated that desire before filing an act or petition setting forth the protest in specific terms.[4]

It may be of interest to note in passing that, in addition to the objection to the Court's jurisdiction by protest, it was also possible by that time to object to the plaintiff's 'right to sue'[5] even where the Court's jurisdiction was not in question;[6] this seems, however, to have been a 'judicial innovation' of Dr Lushington's, much as he established the right of intervention for bottomry bondholders who wished to assert claims in priority.[7]

In addition to filing the required praecipes, it was necessary as well to precede the filing of any documents in the Registry by payment of a fee, for which a 'minute of filing'[8] giving the nature of the document and the date of filing would be entered by a Registry Clerk in the 'minute book'.[9] It seems that this was the era of proliferation of paperwork in Admiralty practice, as witness the number of forms required upon a reference to the Registrar

[1] See *supra*, p. 12.
[2] See Williams and Bruce, 1st ed., p. 187.
[3] *Id.*, pp. 187, 190, 204.
[4] See *id.*, p. 202.
[5] Coote, 1st ed., p. 93.
[6] See *The John and Mary*, (1859) Swab. 471.
[7] *The Aline*, (1839) 1 W. Rob. 111.
[8] *Cf.*, *e.g.*, F.R.C.P. [1 July 1966], Adm. Rule E. (5) (b).
[9] See Williams and Bruce, 1st ed., p. 196.

and Merchants.[1] The partial insufficiency of these procedural safeguards and improvements is also demonstrated in that, at the conclusion of Lushington's service as Judge, it was still necessary for the successful plaintiff in a *contested* action *in rem* throughout which the *res* had remained under arrest to take the same steps to procure a judicial sale of the *res*—even after a decree in his favour—as he would have been forced to take in a default proceeding.[2]

If the evolution of more complex procedure and a far broader Admiralty jurisdiction were principal features of the Court's development during Lushington's judgeship, one cannot overlook an equally important feature—the complex judicial character of the Judge himself. And Dr Stephen Lushington ranks, beyond doubt, as the most enigmatic Admiralty Judge of all those within the scope of this work's consideration.

Despite Lushington's open criticism of Lord Stowell's reluctance to entertain the Admiralty claims of foreign parties[3] for fear of prohibition,[4] he was himself frequently troubled over the status of foreign suitors and defendants in the Admiralty Court. It must be admitted that in wage suits, where Stowell's hesitancy had been greatest, Lushington appeared to have few doubts as to the Court's jurisdiction; not only did he permit American masters—who did not then enjoy a maritime lien for wages in the United States[5]—to bring actions *in rem* for wage recovery under British law,[6] but he made orders for the payment of foreign mariners' wages out of balances of proceeds in the Registry *upon motion*, without any action for such recovery having been instituted at all.[7] Though he had first sanctioned this procedure only to satisfy the claims of materialmen (under §6 of the 1840 Court Act) for the supply of necessaries to foreign ships,[8] he later extended the advantage to foreign seamen and masters, and in one case where a shrewd Yankee skipper—one Henry Clay Dearborn—thus recovered his own wages and disbursements from the proceeds of a bottomry sale,[9] 'the Judge decreed a further

[1] See Williams and Bruce, 1st ed., p. 275.
[2] *Id.*, p. 224.
[3] See, *e.g.*, *The Courtney*, (1810) Edw. Adm. 239.
[4] *Id.*, at 241; see *The Milford*, (1858) Swab. 362, 366.
[5] See Price, *L.M.L.*, p. 127; see *supra*, p. 24.
[6] See, *e.g.*, *The Milford*, (1858) Swab. 362.
[7] See Coote, 2nd ed., p. 144.
[8] See Coote, 1st ed., p. 98.
[9] *The Henry Reed*, (1858) 32 L.T.R. 166.

sum to be paid to him on behalf of a seaman under age, for whose wages the master swore he was personally liable by the law of the [S]tate of Maine, to which the ship belonged.'[1]

On the question of the Court's discretion to refuse to exercise its jurisdiction over foreign suitors [*forum non conveniens*], though the 1859 Rules required notice to be given to the London Consul of the flag state of any foreign vessel against whom a suit was brought in Admiralty for the recovery of wages,[2] and though the Admiralty Law of other nations has historically considered the consent of the Consul as virtually an absolute condition to the entertainment of such a suit,[3] Dr Lushington held that the emphasis should be upon the Court's power to hear the suit rather than the Consul's consent to the exercise of that power, and that the protest of the Consul was not necessarily a bar to the Court's entertainment of the claim.[4] His tendency, in the main, seems to have been toward opening the doors of the Court to seamen suitors.

Where the suitors were foreign shipowners, Lushington found jurisdictional decisions more difficult to reach. Holding the Court unable to entertain a claim in one case,[5] he later found jurisdiction in a case with a very similar fact situation;[6] he would not entertain suit by a foreign shipowner for restraint pending security,[7] but he did exercise the Court's jurisdiction over the possessory claim of a foreign government (U.S.A.),[8] though in both cases the Court clearly had the *res* within its geographical jurisdiction; and in a suit between foreign shipowners he required bail from the defendant in the principal action *in rem*, but held that the Court had no power to require bail from the plaintiffs as defendants of a cross-action *in personam*, though the causes of action and equities of the parties were in both cases the same.[9]

Causes of action arising in foreign waters also proved troublesome for Dr Lushington; he entertained one cause of collision in an Indian river by reasoning that the jurisdiction of the High

[1] Coote, 1st ed., p. 99.
[2] 1859 Rules, r. 10.
[3] Parsons, p. 229, n. 2; *cf. Hay v. Brig Bloomer*, 11 Fed. Cas. 893 (No. 6255) (D. Mass. 1859).
[4] *The Golubchick*, (1840) 1 W. Rob. 143, 147; see also *The Nina*, (1867) L.R. 2 P.C. 38, 47; and 8 *B.D.I.L.* 390 *et seq.*
[5] *The Ida*, (1860) Lush. 6.
[6] *The Courier*, (1862) Lush. 541.
[7] *The Graf A. Bernstorff*, (1854) 2 Sp. 30.
[8] *The Beatrice*, (1866) 36 *L.J. Adm.* 9, 10.
[9] *The Carlyle*, (1858) 30 *L.T.* 278.

Court of Admiralty 'has always' been co-extensive with that of any Vice-Admiralty Court which might have taken the suit[1] (a patently incorrect statement[2]), yet, in the same year, he declared that the Admiralty Court would categorically refuse to exercise jurisdiction over cases of collision of foreign vessels in foreign rivers, on the somewhat unclear rationale that the prohibition by the statutes of Richard II of the exercise of Admiralty jurisdiction in English rivers was somehow applicable to foreign rivers as well;[3] these positions were ultimately reconciled under §7 of the 1861 Court Act, interpreted by Dr Lushington to permit cognizance of collisions upon foreign waters whether involving British[4] or foreign[5] vessels.

It may indeed have been the volume of legislation affecting the Admiralty Court during his judgeship which caused Lushington to adopt a view of its status that differed markedly from that of his predecessors. The earlier view, as stated by Lord Stowell[6] and Sir John Nicholl,[7] was that foreign parties could not enjoy the defences of municipal law because the Court of Admiralty in instance was a Court of International Law rather than a Court of Municipal Law; Dr Lushington's position was diametrically opposite, for in upholding the defence of a foreign shipowner—based upon municipal law—he remarked that: 'the Instance Court of Admiralty is a municipal court, and it is bound to obey the statutes of the realm in all matters.'[8]

Statutory interpretation frequently posed problems for Lushington; more difficult, no doubt, because the nature of most of the statutes affecting the Court was creative rather than amendatory. In some cases he evidently felt that a statutory provision was merely designed to emancipate a previously legitimate piece of the Admiralty jurisdiction from repression by prohibition,[9] but in others, where the applicable provision was one which clearly offered a totally novel extension of the jurisdiction, he often had a tendency to waver; this may be illustrated by two interpretations of §7 of the 1861 Court Act, one holding that 'damage done by any ship' included that done by a tug in negligently bringing her

[1] *The Peerless*, (1860) Lush. 30, 40; *aff'd*, 13 Moo. P.C. 484.
[2] See *infra*, p. 71.
[3] *The Ida*, (1860) Lush. 6.
[4] *The Diana*, (1862) Lush. 539.
[5] *The Courier*, (1862) Lush. 541.
[6] Nys, p. 137.
[7] *The Girolamo*, (1834) 3 Hag. Adm. 169, 184.
[8] *The Johannes*, (1860) Lush. 182, 188.
[9] See, *e.g.*, *The Ironsides*, (1862) Lush. 458, 466.

tow into collision with another vessel,[1] and the other, shortly thereafter, holding that the section did not cover the damage done by a tug in negligently bringing her tow aground,[2] his reasoning there being that this was a breach of contract actionable only at common law—because 'damage' meant only 'collision' (an historically unsound interpretation[3] which was later specifically overruled[4]).

In fairness it ought to be noted that interpretation of the 1861 Court Act is acknowledged to have 'given considerable difficulty' to later lawyers, and that because of this, many jurisdictional questions still remained unsettled at the end of the nineteenth century.[5] For some later doubts, however, Lushington is almost surely directly to blame; his decisional 'about-face' from the position that an action *in rem* could not be instituted unless an action *in personam* upon the same cause was also possible,[6] to the position that an action *in rem* could be brought where an action *in personam* was clearly impossible,[7] set in motion a judicial seesaw which has perhaps not yet come to rest.[8] Again, his shift from the award of costs which, together with the judgment, exceeded the bail in an action *in rem*[9] to a diametrically opposite position[10] and then, upon an interpretation of §19 of the 1861 Admiralty Court Act, returning to his previous holding,[11] has had interesting repercussions.[12] And in one decision, he neatly avoided the problem of apportioning costs by condemning a co-suitor with the Crown in the entire cost of the suit, rather than writing off the Crown's half of the costs to the fee fund.[13]

In general, the pattern of Lushington's decisions—barring occasional anomalies—tended toward an expansion of the Admiralty jurisdiction; and in this he was clearly influenced to a considerable extent by American decisions which had the same effect. He often quoted Mr Justice Story at length,[14] and would compare

[1] *The Nightwatch*, (1862) Lush. 542.
[2] *The Robert Pow*, (1863) Br. & Lush. 99.
[3] See *The Ruckers*, (1801) 4 C. Rob. 73; also A. Browne, vol. 2, p. 397, ¶2.
[4] *The Zeta*, [1893] A.C. 468, 485.
[5] See Marsden, 'Six Centuries', p. 176.
[6] *The Druid*, (1842) 1 W. Rob. 391.
[7] *The Ruby Queen*, (1861) Lush. 266. [8] See *infra*, pp. 148–9.
[9] *The John Dunn*, (1840) 1 W. Rob. 159.
[10] *The Mellona*, (1846) 10 *Jur.* 992. [11] *The Temiscouata*, (1855) 2 Sp. 208.
[12] See *infra*, pp. 174–5. [13] *The Leda*, (1863) Br. & Lush. 19.
[14] See, *e.g.*, *The Magellan Pirates*, (1853) 1 Sp. 81, 90–1.

or contrast Story's views with those of Stowell, Tenterden, and other English jurists.[1] Dr Lushington was fascinated by the evolutionary contrasts between his Court and those on the opposite side of the Atlantic, and in the course of one decision, he put forth this theory:

> In the American Courts, probably, a wider jurisdiction is conceded [cit.]. And the Admiralty Courts in our North American provinces exercise a fuller jurisdiction than the High Court of Admiralty of England. The reason seems to be that, after the Revolution of 1640 broke out, there was a great jealousy against the Ecclesiastical Courts, and this was extended to the Court of Admiralty, and so in Lord Holt's time its jurisdiction was curtailed; whereas in our North American colonies, there were no Ecclesiastical Courts to excite any such jealousy, and the jurisdiction of the Admiralty remained on its ancient footing.[2]

He must have been fascinated by the peculiar statutory grant of a jury trial upon request in Admiralty causes arising upon the Great Lakes[3] (wondering, perhaps, what the influence of the 1840 Court Act, §11, might have been), and the great legal battle fought to the Supreme Court over that provision and the extension of Admiralty jurisdiction to the Lakes at all, culminating in the rejection of the ancient limitation of jurisdiction to tidal water.[4] Nor were such judicial extensions of jurisdiction as that encompassing wrongful conversion of a whale upon the high seas likely to have escaped his notice,[5] and it is perhaps little wonder that his decision establishing the discretion of the Court to apply the doctrine of *forum non conveniens*[6] bears a notable resemblance to a decision on the same point made a few years earlier by Judge Ware.[7] No Admiralty Judge before or since his time has had a better knowledge of the comparative features of the Admiralty Laws of the English-speaking world, and none put such knowledge to better use than Lushington.

In his view of the equitable nature of Admiralty, Lushington was consistently firmly assertive. In ordering the marshalling of

[1] See, *e.g.*, *The Constancia*, (1846) 2 W. Rob. 487, 490–1.
[2] *The Royal Arch*, (1857) Swab. 269, 277.
[3] Act of February 26, 1845, c. 20; see Conkling, pp. 3–8.
[4] See *The Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443 (1851); see also Parsons, pp. 163–5.
[5] *Taber v. Jenny*, 23 Fed. Cas. 605 (No. 13720) (D. Mass. 1856).
[6] *The Golubchick*, (1840) 1 W. Rob. 143.
[7] *The Bee*, 3 Fed. Cas. 41 (No. 1219) (D. Me. 1836).

assets for the payment of Admiralty claims, a practice which he made common in the Admiralty Court,[1] Dr Lushington declared that the Court 'sits as a Court of Equity';[2] and later: 'if a Court of Equity would relieve, and a Court of Law could not, . . . it would be my duty to afford . . . relief . . . The jurisdiction which I exercise is an equitable as well as a legal jurisdiction . . .'[3] Of course Admiralty jurisdiction has always exhibited an equitable character, particularly in rewarding salvage,[4] but Dr Lushington was the first Admiralty Judge consistently to claim an equitable jurisdiction *per se*, though he had some doubts that it was sufficient to permit him formally to try equitable titles;[5] but he had no hesitancy in applying the equitable doctrine of laches to bar the enforcement of stale maritime liens,[6] and his views as to the Court's equitable powers have served the Court well since it formally obtained the jurisdiction of Equity.[7]

Lushington, a complex personality, seems to have been at his best in coping with cases of great complexity—whether on the facts,[8] as in cases of possessory suits to determine the title to ships sold by the master abroad,[9] or on the law, as in considering the special status of passengers as salvors, involving a delicate balance of law and facts in determining whether the service was sufficiently extraordinary to merit reward.[10] Moreover, in reaching his decisions as Admiralty Judge, Dr Lushington showed a vigorous determination to preserve the independence of Admiralty, to the extent that he declared himself not bound by decisions at common law of the House of Lords,[11] and that, though he might attach great weight to such decisions, and felt bound to respect decisions of the Privy Council, and of the Courts of common law on the construction of statutes,[12] yet 'a verdict obtained in the same cause at Common Law, ought not to be cited' in the

[1] See Coote, 2nd ed., p. 143.
[2] *The Trident*, (1839) 1 W. Rob. 29, 35.
[3] *The Harriet*, (1841) 1 W. Rob. 182, 192.
[4] See Abbott, p. 999.
[5] *The Victoria*, (1858) Swab. 408, 410; *cf. supra*, pp. 11, 43.
[6] See, *e.g.*, *The Europa*, (1861) Br. & Lush. 89, 91, 97.
[7] See, *e.g.*, *The Tubantia*, [1924] P. 78.
[8] See, *e.g.*, *The Margaret Mitchell*, (1858) Swab. 382.
[9] See, *e.g.*, *The Bonita*, (1861) Lush. 252.
[10] See, *e.g.*, *The Vrede*, (1861) Lush. 323; *cf. Newman v. Walters*, (1804) 3 Bos. & Pul. 612.
[11] *The Actæon*, (1853) 1 Sp. 176, 177.
[12] See Coote, 1st ed., p. 16.

Admiralty Court, and any article in the pleadings which recited a prior action at common law was accordingly stricken.[1]

The final impression of Lushington as a Judge is an extremely mixed one; judicial inconsistency—a serious fault to bring to any bench—was surely his greatest and most obvious shortcoming, and yet in some lines of decision traceable throughout his judgeship he clung tenaciously to the same principles;[2] he seemed sometimes to let an opportunity to extend the Court's jurisdiction slip from his grasp, and yet under his aegis it acquired jurisdiction never before possessed; and he made some totally unaccountable statements concerning the evolution of the Law and Court of Admiralty,[3] yet he was in general better versed in this small branch of history than any other holders of his office have been.

If in these ways Lushington was a man of contradictions, in others no doubts could gather. From the time of acting as advocate for the mistreated crewman of the *Lowther Castle*,[4] he was benevolent to the plight of the mariner. He was a lover of unpopular causes, and he made his foremost cause the strengthening and advancement of the Admiralty Court; he strove consistently for the modernization of the Admiralty Law, and his success in this was acknowledged.[5] And he had no fear of the common lawyers, at a time when they could have done much to upset the Court's progress had they so desired.

It is well to remember that a magnified view inevitably shows blemishes otherwise unnoticed. Dr Lushington was Judge of the High Court of Admiralty for one year less than the term of Lord Stowell, and yet in those twenty-nine years the Court grew more prodigiously than in any comparable period in its history; more importantly, the greatly increased volume of instance causes adjudicated during those years dealt heavily with both statutes granting new jurisdiction and exercises of that new jurisdiction to an extent which has never been equalled—and the overall result has been a body of decision which may still be relied upon to guide the Court's continuing development.[6]

[1] *The Clarence*, (1854) 1 Sp. 206, 209.
[2] See *infra*, p. 173.
[3] See, *e.g.*, *supra*, pp. 68–9; *infra*, p. 94.
[4] See (1825) 1 Hag. Adm. 384; *supra*, p. 45.
[5] See, *e.g.*, Roberts, p. 6.
[6] In the U.S. as well; see, *e.g.*, *The Nyland*, 164 F. Supp. 741, 743 (D. Md. 1958).

As to his ranking amongst Admiralty Judges, Dr Stephen Lushington can be considered second only to Lord Stowell—and in addition it must be granted that Lushington was Judge throughout the most difficult and challenging period in the history of the instance jurisdiction.

But that liberal quality which was Lushington's fame helped—quite unintentionally—to bring about the destruction of the civilians as an English institution, for it was during his judgeship, and partially as a result of his recommendations for Court reform, that the College of Advocates was dissolved.

CHAPTER 3

THE FALL OF DOCTORS' COMMONS

DOCTORS' COMMONS is situate in Great Knight-Rider-street, to the south of St Paul's Cathedral. It is the college of civilians, where the civil law is studied and practised, and derives its name from the civilians commoning together as in other colleges. Here are kept the courts which have cognizance of injuries of an *ecclesiastical*, *military*, and *maritime* nature.[1]

So commences a description of that bastion of the civil law in England, given at the dawn of the nineteenth century by the most elegant of London's pictorial surveys. But in modern London the few yards of Knightrider Street which run along behind the College of Arms bear no traces whatever of the College of Civilians, and the name of Doctors' Commons has itself lain ghostly for more than a century.

What this august body was, how it came to be, and, more significantly, how it came to be dissolved, is intricately bound up with and essential to an understanding of the subsequent evolution of the Law and Court of Admiralty, for it literally *was* the Admiralty Court for hundreds of years. Moreover, 'the part played by the doctors in . . . the development of maritime law . . . seems a topic of wider interest than anything they did as Canonists . . .'[2]

As it is a natural concomitant of the existence of any profession that its practitioners associate themselves in some formal way, it is not surprising that those advocates in the courts of the civil law should have formed an association somewhat akin to the Inns of Court formed by their barrister counterparts at common law. The official title of this organization, the 'College of Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts', was not acquired until its Royal Charter in 1768,[3] but the 'College of Civilians', 'College of Advocates', or, more popularly, 'Doctors' Commons' (taken from the physical premises of the College) had already been in existence for centuries. As for the practice of

[1] Ackermann, vol. 1, p. 224.
[2] Senior, intro., p. v; but see Moore, p. 128; Nys, pp. 105–7.
[3] See Parl. Paper [1859] (19) xxii (H.C. 20 January), p. 2.

Admiralty, the Doctors were organized by 1430,[1] and records of the College itself run from its formal foundation in 1511 by Dr Richard Bodewell, then Dean of the Arches.[2]

The civilians were the descendants of the mediaeval canon lawyers, and retained that heritage by continuing their monopoly over Ecclesiastical as well as Admiralty practice;[3] it is said to have been the suppression of the canonists by Henry VIII—who abolished the Faculties of Canon Law at Cambridge and at Oxford—which turned them principally to the practice of the civil law,[4] and in this they must have established themselves without delay, for the Masters in Chancery during the Tudor era were evidently civilians.[5] Doctors' Commons seems to have been an 'offspring' of Trinity Hall, Cambridge, itself founded in 1350 as a college for study of the civil and canon laws,[6] and despite other schemes—such as that of Protector Somerset to found 'Edward's College' in the University of Cambridge for the sole study of the civil law[7]—Trinity Hall continued to act as 'parent' to Doctors' Commons until the latter received its own charter.

To become a Fellow of the College of Advocates, one must have earned a doctorate in civil law at either Oxford or Cambridge. This was a strict requirement; holders of doctorates from other universities were not eligible, nor would a 'Lambeth Degree' [by archiepiscopal mandamus] or doctorate *honoris causa* in one of the two ancient universities suffice.[8] Moreover, despite (or perhaps, because of) the ecclesiastical functions of the College and its concern with canon law, no person in holy orders was admissible —even if, as in the case of the unfortunate Dr Highmore, he had abandoned his clerical calling and taken a doctorate with the express intention of practising in Doctors' Commons.[9]

The candidate must then have been admitted as an advocate of the Arches, and elected by a majority of the Fellows of the College; admission as an advocate of the Arches was upon the completely discretionary fiat of the Archbishop of Canterbury directed to the Dean of the Arches, and this admission had to

[1] Senior, p. 33.
[2] *Id.* pp. 35, 72.
[3] See Roscoe, *H.C.A.*, p. 3.
[4] Senior, p. 65.
[5] *Id.*, pp. 70–1.
[6] *Id.*, pp. 75–6.
Reeve, pp. 32–3.
[7] Senior, pp. 69–70.
[8] *Id.*, pp. 77–8.
[9] *The King v. The Archbishop of Canterbury*, (1807) 8 East 213 [K.B.].

have been preceded by one year's Court attendance,[1] known as the 'Year of Silence', during which he was not allowed to plead.[2]

At Cambridge, where the doctorates of civil and canon law were conferred together in the LL.D., the course of study leading to the degree consumed a minimum of ten years for those not previously M.A. (otherwise eight years), and required both the attending and giving of lectures.[3] In addition to fulfilling these formal academic requirements, which were similar for the D.C.L. at Oxford, proceedings in the Courts of the two ancient Universities were also entrusted to the civilians.[4]

Because of the stringent course of qualification, the number of advocates was always small—and for this reason, perhaps, formal incorporation was delayed; but the body was large enough to require premises of its own. 'Wolsey is said to have planned the building of a fitting college in London for the doctors', most of whom were then lodged in Paternoster Row, by St Paul's.[5] But this scheme fell through, and so it was that in 1567 the Master of Trinity Hall, Dr Henry Hervey, obtained from the Dean and Chapter of St Paul's a lease (in the name of the Master and Fellows of Trinity Hall, Cambridge) in trust for the College of Advocates upon 'an ancient tenement, called Montjoy House' for the use of the civilians, and there the Admiralty Court soon began to sit,[6] having moved from the disused Church of St Margaret in Southwark.[7]

In 1665, the doctors fled the great plague, first sitting briefly in Winchester, and thence to Oxford, where the Court sat in the Hall of Jesus College[8] (of which the Admiralty Judge, Sir Leoline Jenkins, was the Principal). And then, with the civilians safe, the Fire of London in 1666 destroyed Montjoy House.[9] Evidently, while the new Doctors' Commons was being constructed upon the same site, the Admiralty Court sat at Exeter House in the Strand, returning in 1671 to the home of the doctors.[10]

Unfortunately, the Fire did nothing to resolve differences over

[1] See Holdsworth, *H.E.L.*, vol. 4, p. 236; vol. 12, p. 47; also Parl. Paper [1833] (670) vii (H.C. 15 August), p. 49.
[2] Nys, p. 118.
[3] See Holdsworth, *H.E.L.*, vol. 4, pp. 229–30 and n. 7.
[4] Senior, p. 11.
[5] *Id.*, p. 73, n. (2).
[6] See Parl. Paper [1859] (19) xxii (H.C. 20 January), p. 4.
[7] Senior, p. 27; also Roscoe, *Studies*, p. 9.
[8] *Id.*, p. 100.
[9] Parl. Paper [1859] (19) xxii, p. 5.
[10] See Roscoe, *Studies*, p. 3.

the lease, concerning which four great battles were fought with the Dean and Chapter; in the first three the doctors emerged victorious (though in the last of these only by a decree of the House of Lords), still paying in 1728 the same renewal fine negotiated by Dr Hervey—£20. The fourth battle, however, was won by the Dean and Chapter, and the existence of Doctors' Commons was quite precarious for a time, until the doctors decided to bargain with the Dean and Chapter without trustees, whereupon Trinity Hall lost its parental association with the doctors, and they, 'at a very considerable expense', obtained a Royal Charter in 1768. Whether this step was of much help may be doubted, for the best terms which the Doctors were able to secure amounted to a forty-year lease at a fine of £4,200 plus £105 *per annum* to the Dean and Chapter—which they could just meet by mortgaging the lease on hard terms. Only the success of a petition to the Crown averted financial disaster, and a Royal Bounty of £3,000 was granted from the droits of Admiralty in 1782, which enabled the purchase of the freehold.[1]

The number of Fellows of Doctors' Commons rose from seventeen at its incorporation to twenty-six by 1858[2]—still an incredibly small body to have had an absolute monopoly upon all the legal practice within its sphere. The monopoly was also physical, for in addition to the Admiralty Court, the Common [dining] Hall of Doctors' Commons was the sitting-place of the Court of Arches, the Court of Peculiars, the Prerogative Court of Canterbury, the Consistory Court of London, the Dean and Chapter of St Paul's Court, the Court of Rochester, the Court of Surrey,[3] the Archdeacons' Court, and the High Court of Delegates;[4] and it seems probable that, prior to the nineteenth century, it was occasionally host to other civil law courts such as the High Court of Chivalry [Court of Constable and Marshal].[5] Interestingly, maritime criminal proceedings were tried at Admiralty Sessions in the Old Bailey before two common law judges, with the Admiralty Judge presiding.[6]

Even granting the existence of a monopoly so comprehensive

[1] See Parl. Paper [1859] (19) xxii (H.C. 20 January), pp. 5–6; also Nys, p. 117.
[2] See Parl. Paper [1859] (19) xxii, pp. 2, 7.
[3] See Parl. Paper [1833] (670) vii (H.C. 15 August), pp. 9–27.
[4] See Ackermann, p. 225.
[5] *Id.*, p. 224 (note reference to *military* causes).
[6] See Parl. Paper [1833] (670) vii, p. 35.

that Sir John Nicholl—as Judge of the Admiralty, Dean of the Arches, Dean of Peculiars, and Judge of the Prerogative Court of Canterbury—heard virtually *all* Admiralty and probate matters in England, and both original and appellate ecclesiastical causes as well,[1] it must be admitted that the legal knowledge of the doctors was vast and unique, and acquired with a special view to the needs of the courts in which they practised. The instance side of the Admiralty Court was 'governed by the civil law, the laws of Oleron, and the customs of the Admiralty, modified by statute law';[2] and in addition to such technical legal knowledge, a grasp of the practicalities of the field was necessary, for 'the interrogator . . . should possess some small knowledge of seamanship, otherwise his questions may excite ridicule'[3]—a point of particular importance with the advent of oral testimony—and he had to beware of witnesses who were brought up in the coal or coasting trade, particularly if in square-rigged ships, for their nautical acumen was alleged to be formidable.[4]

Not only was the doctors' knowledge of the law put to use in the civil law courts, but in those of common law as well, for Lord Mansfield established the practice of bringing the civilians into the King's Bench to give argument in causes involving maritime questions,[5] and a development of this custom can be seen in Dr Lushington's judgeship, where, in a case of murder on the high seas, Drs Dodson and Phillimore for the Crown, and Dr Addams for the defence, gave argument before thirteen Judges of the Court for Crown Cases Reserved in the Hall of Serjeants' Inn.[6]

In addition to their practice in Doctors' Commons and the academic work which many of the doctors retained, one of their chief occupations lay in their capacity as legal advisers to the Crown upon any questions of international law, and they were frequently appointed as official representatives of the realm in matters of legal diplomacy.[7]

The function of the doctors as surrogates, sitting temporarily for the judges of the courts of civil law, was fairly commonly

[1] See Parl. Paper [1833] (670) vii (H.C. 15 August), pp. 9–27.
[2] A. Browne, vol. 2, p. 29.
[3] Van Heythuysen, p. 8.
[4] See *id.*, p. 7.
[5] See Senior, p. 107.
[6] *R. v. Serva* (*The Felicidade*), (1845) 2 Car. & K. 54; *The Times*, 17 Nov. & 4 Dec.
[7] See Nys, ch., VII, pp. 123–38, 'Les Avis et les Consultations'; also 7 *B.D.I.L.* 243, 'Legal Advisers of the Crown'.

exercised until the mid-nineteenth century. And the custom must have arisen long before, for it is said that after Dr Lewes became Admiralty Judge in 1558 he continued to practise as an advocate (presumably in the other courts) for five or six years in order to make a living, and that he complained of his surrogates' withdrawal from the Court, which forced him to attend to all of his judicial duties.[1] Evidently all of the Fellows of Doctors' Commons were surrogates, or eligible to act as such, for the Judge of the Admiralty,[2] and occasionally a surrogate sitting for the Judge rendered a decision of importance, as in the case of *Lord Warden of the Cinque Ports v. the King in his office of Admiralty*[3] (this last being the proper form of address to the office of Lord High Admiral while in Commission[4]), where Dr Joseph Phillimore, sitting for Sir Christopher Robinson, established the principle of awarding a salvage recovery to the captors of royal fish. By the 1840 Court Act, only the Dean of the Arches was permitted to sit as surrogate for the Admiralty Judge, and then only in certain cases;[5] perhaps because of the uselessness of this provision after 1858, when Dr Lushington became Dean of Arches as well as Admiralty Judge, the 1861 Court Act allowed the Admiralty Registrar to sit as surrogate,[6] and from that time until the abolition of surrogates by the Judicature Acts the Registrar (and, in his place, the Deputy Registrar[7]) was the only surrogate. The last instance of the exercise of the Admiralty jurisdiction by a surrogate seems to have been in 1874, when the Registrar in that capacity pronounced a decree upon default in an action *in rem*.[8]

The attorneys and solicitors had their civilian counterparts as well; this other class of practitioners in Doctors' Commons was also of ancient origin, the title *proctor* being said to derive from the Roman *procurator*.[9] This body, though not subject to the rigorous process of selection which limited the number of advocates, was likewise a small one; there were only nineteen practising Proctors-in-Admiralty in 1833,[10] and the number had perhaps doubled by 1855.[11]

[1] Senior, p. 79.
[2] (1831) 2 Hag. Adm. 438.
[3] Admiralty Court Act, 1840, §1.
[4] See *id.*, p. 78.
[5] A. Browne, vol. 2, p. 27.
[6] Admiralty Court Act, 1861, §25.
[7] Thompson, p. 32.
[8] *The Vladimir*, [unrep.]; see Thompson, p. 32.
[9] Parsons, p. 358.
[10] See Parl. Paper [1833] (670) vii (H.C. 15 August), p. 62.
[11] See *Papers on 1855 Rules*, p. 16.

Not a great deal can be said concerning the life led by the proctors, save that they formed firms and had their offices in Doctors' Commons (though not members thereof), that they had a monopoly over their sphere of activity in the civil law, which corresponded to that of the advocates retained by them, and that, as will be seen, they were most conscious of any threat to their purses. The duties of the Proctor-in-Admiralty to the Court were the subject of comment by Lord Stowell, who evidently felt that not enough was done to secure settlement out of Court in appropriate cases—indeed, he accused one proctor of maintenance, and condemned him personally in the costs of the suit.[1] A similar action was taken by Dr Lushington on one occasion when in a suit commenced on behalf of the master, owners, and crew of a vessel, judgment having gone for the defendant, the plaintiffs' proctor confessed that he did not know who his clients were.[2] This situation may have arisen because the procedure whereby a proctor was required to exhibit a proxy by way of power of attorney to conduct the suit in order to institute it—though once a firm rule—had by Lushington's day become routinely ignored.[3]

Architecturally, Doctors' Commons was evidently quite splendid. The 'Great Quadrangle' (of which there is a drawing in the London Museum) was entered through an archway from Knightrider Street, and opposite was another archway leading into a second quadrangle and a garden. The buildings included the dwellings and chambers of the advocates and the offices of the proctors (which prior to 1770 were sublet by Trinity Hall), the Common Hall, and an informal dining room, over which was a 'spacious and well-stocked' library[4] (the catalogue of 1818 was 236 pages long[5]). The Admiralty Registry's address was 'Number 3 Paul's Bakehouse Court, Doctors' Commons', but it actually occupied numbers two and three, in the latter of which the Marshal also had his office. After 1770 the individual advocates became sublessors—it will be recalled that in 1853 the landlord of the Registry premises was Dr Addams.[6]

The Common Hall seems to have been used only infrequently for dining, and it is certainly better known as a courtroom. The hearing of ecclesiastical causes must have been both colourful

[1] *The Frederick*, (1823) 1 Hag. Adm. 211, 219–24, 225.
[2] *The Whilelmine*, (1842) 1 W. Rob. 335.
[3] See Parsons, p. 358.
[4] Senior, p. 101.
[5] Nys, p. 119 *et seq.*
[6] See McGuffie, *Notes on Letter Books*, pp. 14–15, 24.

and picturesque (see the plate, p. xxix), with the doctors resplendent in their scarlet robes, academic hoods and round black velvet doctors' bonnets, and the proctors in gowns of dark blue with the hoods of their degrees worn by those who were graduates of the Universities, and hoods lined with lamb's skin by those who were not; proceedings in Admiralty were slightly more sombre because the doctors wore their black academic gowns, but the gilt anchor remained fixed above the bench at all times, with the Judge and advocates seated upon a raised dais above the proctors, who were seated almost at floor level around a green-topped table, at one end of which was the bar of the Court.[1]

Charles Dickens, himself a freelance reporter in Doctors' Commons for about five years from 1828, later satirized the civilians in *David Copperfield*; Dickens had been office boy to the firm of Ellis & Blackmore, so his David became articled to the fictitious proctors' firm of Spenlow & Jorkins. He described[2] Doctors' Commons as 'a lazy old nook . . . that has an ancient monopoly in . . . disputes among ships and boats', the typical proctor as 'a sort of monkish attorney— . . . a functionary whose existence, in the natural course of things, would have terminated about two hundred years ago', and the doctors, whose 'red gowns and grey wigs' he found noteworthy, were less curious to him than a certain Judge (possibly Sir Christopher Robinson), 'whom, if I had seen him in an aviary, I should certainly have taken for an owl.' The system of surrogates, complicated by a common courtroom for all of the various types of causes, evoked this vision:

> . . . and you shall find the judge in the nautical case, the advocate in the clergyman's case, or contrariwise. They are like actors; now a man's a judge, and now he is not a judge . . . but it's always a very pleasant, profitable little affair of private theatricals, presented to an uncommonly select audience.[3]

As to the whole of Doctors' Commons, Dickens concluded:

> Altogether, I have never, on any occasion, made one at such a cosey, dosey, old-fashioned, time-forgotten, sleepy-headed little family party in all my life; and I felt it would be quite a soothing opiate to belong to it in any character—except perhaps as a suitor.[4]

[1] See Senior, p. 77; also Roscoe, *Studies*, pp. 6–7.
[2] See Holdsworth, *Dickens*, pp. 30–3.
[3] From *David Copperfield*, ch. 23; Holdsworth, *Dickens*, p. 31.
[4] *Ibid.*; *id.*, p. 33.

Judging by what evidence is available in the present, Dickens' satirical view is probably not far off the true mark of the outward appearance of Doctors' Commons in his day; but while allowing the accuracy of these external observations, 'let us not forget it was a talented little family . . . ; that some of its members . . . have left a permanent mark upon all those various branches of the law which once made up the sphere of the civilians' practice.'[1]

The tranquil atmosphere of Doctors' Commons was shattered in 1853 by the revelation of the Swabey affair, and it never was regained. In large part, this was due to the activities of the new Admiralty Registrar, H. C. Rothery, whose zeal for reform of the Admiralty Court often generated friction with the practitioners. Partly, this was a direct outgrowth of the Swabey matter itself, which soon resulted in the substitution of stamps for cash receipts by the Court Act of 1854; it appears that the collection of fees by stamps was first suggested by Rothery, in a letter written by him to the Treasury Secretary a few months prior to the passage of the 1854 Act.[2] This change was rather unwelcome to the proctors because they had earlier enjoyed the benefit of fee accounts kept in each name by a full-time fee clerk in the Registry. These accounts were rendered quarterly, so that the proctors might not have been billed until some months after the conclusion of a cause (and they were evidently slow to pay the accounts even once they had received them[3]). After the abolition of receipts for fees and the substitution of stamps, the proctors were naturally obliged to part with cash at each stage of an action which required a praecipe for its initiation—a grievous irritation to many of them. So thorough, indeed, was Rothery's fee reform, that the only fees to be collected without stamps after 1854 were those of the Seal Keeper (6*d.* to 1*s.* for each affixation) and the Court Crier (5*s.* upon each sentence or decree), who were the sole unsalaried officers.[4]

It was not Rothery's action in securing fees by stamp (which closely resembled the scheme already in use in Chancery[5]), however, which provoked the proctors into an attack upon him, but his proposals for effecting reform of the Court's procedure.

[1] Holdsworth, *H.E.L.*, vol. 12, p. 50.
[2] See *Papers on 1855 Rules*, p. 32, ¶5.
[3] *Id.*, ¶¶4, 5. [4] *Id.*, p. 34, ¶3.
[5] See *id.*, p. 32, ¶5.

These he first put forth in a privately published pamphlet in 1853 entitled *Suggestions for an Improved Mode of Pleading*, and which, in itself, was by no means objectionable to the proctors though it emphasized particularly the need to modernize the rules governing oral testimony. It was later asserted that the adoption of Rothery's suggestions gave to the Admiralty Court a longevity not enjoyed by the other principal courts of Doctors' Commons,[1] and this may very well have been the case; but it is surely true that his successes in 1853 and 1854 put Rothery in a position of great strength regarding the introduction of other procedural reforms, some of which, in retrospect, are much more difficult to support. The suggestion upon which the ire of the proctors became focused was that advanced by Rothery in his 1855 rule proposals which called for the printing of each instance proceeding, including the pleadings and proofs for each party; in May 1855, a considerable number of firms and individual proctors signed a strong letter of protest addressed to Dr Lushington.

The proctors viewed Rothery's proposals 'with considerable alarm and anxiety', and they opened with the charge that 'these Rules have been kept from the body of Proctors, whilst some of the junior members of the profession have been consulted on the subject'.[2] While the letter then went on to complain that the proposed mode of examination of witnesses would, in their opinion, add to expense and delay, the great majority of the proctors' attention was directed to the printing proposal. There can be no doubt, despite other peripheral arguments, that the fear of the proctors was for their purses; they took pains to point out that Proctors-in-Admiralty traditionally advanced money out of their own pockets to carry on suits (a practice which sometimes developed to maintenance), and that the new practice of paying fees by stamps—which they viewed as 'excessive', and 'a great practical evil'—had already materially reduced their remuneration, so that the burden of cost of printing the proceedings—'a hazardous experiment'—would prove ruinous to them, as the printing of the bills in Chancery had to solicitors practising in that Court.[3]

Rothery offered a lengthy and reasoned reply to the complaints

[1] See 5 *L. Mag. & Rev.* (n.s.) 34, 35 (1858).
[2] *Papers on 1855 Rules*, p. 14, ¶1.
[3] *Id.*, pp. 14–15.

of the proctors, the crux of which was his calculation that 100 copies of a proceeding could be printed 'at little more than the price' of one manuscript copy, and this statement he supported by figures which he had prepared and circulated in 1854.[1] By itself, this impressive argument could probably have served Rothery's purpose, but, perhaps angered to the point of intemperance, he then ventured to suggest (1) that the proctors' clerks were abused by being forced to do 'constant routine copying, which ends by making them mere machines', (2) that the proctors' charges to clients in appellate causes were 'wholly unjustifiable', (3) that the situations in Chancery and Admiralty were not comparable, and (4), that 'the great majority' of the complaining proctors were 'not amongst the most competent to form a correct judgment', because their practice was largely in the Prerogative and Ecclesiastical Courts, and that many of the most active Proctors-in-Admiralty had not signed the letter.[2] Probably no answer could have been more calculated to infuriate the opposed proctors, and to Rothery's last assertion must be compared two names in particular amongst those who did sign the letter, Dr Edwin Edwards and Henry C. Coote, both of whom authored leading texts on Admiralty jurisdiction and practice.

Prior to the Registrar's answer, Dr Lushington released his draft of the Order-in-Council for the 1855 Rules, and from a comparison of it with the letter written by the proctors[3] it can be seen that several of Rothery's proposals were dropped from the eventual 1855 Rules, and these were, specifically, seven rules which would have forced the proctors to use the Admiralty Registry as an agent for the printing of the proceedings, at a fixed fee.[4] But the provision for compulsory printing of the proceedings, Rule 10, was secured nonetheless, and the 1855 Rules therefore embodied the proctors' major objection, which evidently continued to be voiced, for in the following year Rothery said of the 1855 Rules: 'They give me a great deal of occupation and some anxiety from the continued opposition of the Proctors.'[5] It was during this unrest that the last crisis of the existence of Doctors' Commons began.

Three Judges of the High Court of Admiralty (Sir Charles

[1] See *Papers on 1855 Rules*, pp. 19, 25–30.
[2] *Id.*, pp. 20–4.
[3] *Id.* pp. 3–5, 14, 15.
[4] *Id.*, p. 21.
[4] McGuffie, *Notes on Letter Books*, p. 128.

Hedges, Sir George Hay, Sir John Nicholl) had in addition held the Judgeship of the Prerogative Court of Canterbury, which tried nearly all testamentary causes in England; despite virtually unanimous testimony, including that of Sir John Nicholl, in opposition to a consolidation of the two judgeships, the 1833 Report of the Select Parliamentary Committee on the Admiralty Court recommended not only a single Judge for the Admiralty and Prerogative Courts, but the merger of the latter with the Court of Arches, and the abolition of all other ecclesiastical courts.[1] Why nearly a quarter of a century passed before any action was taken upon that recommendation is not clear, but by Act of Parliament in 1857 a Court of Probate was established, the testamentary jurisdiction of the ecclesiastical courts was abolished and an exclusive jurisdiction conferred upon the new Court, a Judge of Probate was provided for, and it was also provided that the Judgeships of Admiralty and Probate might be merged upon the next vacancy in either office.[2]

Alone, this move was no threat to the security of the civilians; their *judicial* monopoly was still preserved. But probate matters had always been the mainstay of Doctors' Commons, and it was the monopoly over this *practice* which provided the great majority of the civilians' financial support. What would be the consequence of breaking this monopoly was made clear by several witnesses in the 1833 Report, including the Lord Chief Justice; and the most succinct expression of this common opinion came from one later proven highly qualified in matters involving the finances of the courts of civil law—the then Deputy Registrar of the Admiralty Court, H. B. Swabey—in response to a question from Henry Labouchere, M.P.:

> **Q.**: If the jurisdiction in matters testamentary were transferred from the Spiritual Courts to the Courts of Equity, could a bar and a set of practitioners be maintained for the Admiralty jurisdiction and the matrimonial only?—
>
> **A.**: Certainly not.[3]

Despite that clear warning, the Court of Probate Act in 1857 broke the civilians' monopoly and admitted the common lawyers

[1] Parl. Paper [1833] (670) vii (H.C. 15 August), pp. 4–5.
[2] Court of Probate Act, 1857, §§3–10.
[3] Parl. Paper [1833] (670) vii, p. 62.

to probate practice, though reciprocally admitting the civilians to the practice of the common law.[1] And at the same time, another Act ended the monopoly over matrimonial causes, abolished the ecclesiastical matrimonial jurisdiction, conferred it upon a new Court for Divorce and Matrimonial Causes, and constituted as its Judge Ordinary the Admiralty Judge.[2]

Unaccountably, there have arisen complete misconceptions about the effect of the Court of Probate Act upon Doctors' Commons and its Admiralty practice; two statements in particular deserve attention, that 'by it [the Act] the College of Advocates . . . was dissolved',[3] and that the Act 'abolished' the 'special privilege' of the civilians alone to practise in Admiralty;[4] these statements are unfortunately quite incorrect, and the truth is considerably more complex. What the 1857 Court of Probate Act did contain was a means of self-destruction for Doctors' Commons, in two sections which enabled the College of Advocates to buy and sell real and personal estates belonging to it, and to surrender its charter and dissolve itself.[5]

The Parliamentary debates of both Houses upon the bill were heavily concerned with proper compensation to the proctors for the loss of their monopoly, as the cost of entering that branch of the profession of the civil law had been so notoriously great—principally because of the tremendous premiums involved in securing articles and partnerships. Only once, however, does the plight of the doctors appear to have entered consideration—an M.P. asked briefly whether the College of Advocates, whose 'business . . . would be at an end', ought not to be given the power to dispose of its assets—and in an equally brief reply the Attorney-General stated his opinion that legislative permission was not necessary, but that he would nonetheless welcome the inclusion of covering provisions in the Act.[6] At least this exchange serves to prove that the Act was not passed without the effect having been considered, and, indeed, it was clearly passed in anticipation of the doctors' loss of business.

One's impression must be that this was the final triumph of the

[1] Court of Probate Act, 1857, §§40, 42, 43, 45.
[2] Matrimonial Causes Act, 1857, §§2, 6, 11, 15.
[3] Roscoe, *H.C.A.*, pp. 3–4; *Studies*, p. 2.
[4] P.R.O., *Guide*, vol. 1, p. 157.
[5] Court of Probate Act, 1857, §§116, 117.
[6] Hansard, vol. 146 [H.C. Deb.], cols. 1307–8, 10 July 1857.

common lawyers—that they condemned the civilians and then handed them a razor with which to cut their own throats—and while this is essentially the case, such an assertion must be modified by two considerations: first, that it was done seemingly without a trace of malice, and in the sincere quest for betterment of the legal system, and, secondly, that the civilians need not have executed themselves, but might have continued to live, if not to prosper as before. These considerations, and the actual circumstances of the dissolution of Doctors' Commons seem wholly to have escaped subsequent exposure, and even the sole published work professing to deal specifically with the fall of the College places the onus upon the 1857 Act, *viz.*: 'thus encouraged, the doctors at last put an end to their corporate existence.'[1]

Again, the truth is somewhat more complicated; there in fact was a bitter and hard-fought battle within the College of Advocates. A faction of some size, headed by John Lee, LL.D., desired the preservation of the College as an institution for the promotion of the study of civil and canon law, and objected to any move to sell the property or surrender the charter of the College, which they felt might be 'handed down to a race of successors for as many years as it has by the prudence and wisdom of our predecessors already existed'.[2] The opposition to Dr Lee seems not to have been led by any one of the Fellows in particular, but there is every indication that Dr Lushington, at whose suggestion the merger of the Judgeships of Admiralty and Probate was provided for in the 1857 Act,[3] was willing to accept dissolution of the College as the inevitable price. It is not possible, however, to ascribe the highest motives to all of those who desired the surrender of the College charter, for it was also provided in the Act that upon surrender, all of the real and personal property of the College—amounting in value to many thousands of pounds—would be distributed in equal shares among the then Fellows of the College 'for their own use and benefit'.[4] Sadly, the main motive of the majority of the doctors in desiring the dissolution of the College appears to have been nothing more than simple avarice.

The Court of Probate Act came into operation on 11 January 1858, and on the 15th the Fellows first met to make their decisions;

[1] Senior, p. 110. [2] Parl. Paper [1859] (19) xxii (H.C. 20 January), p. 9.
[3] Hansard, vol. 145 [H.L. Deb.], col. 390, 18 May 1857.
[4] Court of Probate Act, 1857, §117.

by 4 February, a majority of the Fellows had voted the immediate distribution of the College's personal property—£600. in consols to each—and Dr Lee had resolved to fight to the bitter end.[1] Lee's case was set forth in a memorial to the Visitors of the College, including the Archbishop of Canterbury and the Lord Chancellor, by which he argued that dissolution would be a breach of trust under the charter and contrary to the intent of the founders of the College, that the true intent of Parliament was to permit a reorganization of the college to enable it to continue its functions under the new circumstances, that dissolution would be a breach of faith with a public which looked to the College for inducement to those wishing to undertake study of the civil or canon law, that Parliament had not given any authorization for release of trusts set up under the charter, and that the resolution of the majority of the Fellows purporting to compel the compliance of Dr Lee and those who stood with him was an act *ultra vires* and void; and he concluded by praying that the Visitors would exercise their powers under the charter to institute an inquiry.[2]

An eminent legal historian has said of Dr Lee's argument, 'But, seeing that the College had never performed any educational functions, and that the property had been purchased by its members for purposes which could now no longer be carried out, it is impossible to support this contention.'[3] What could have induced such a fatuous statement is difficult to say, for even a superficial reading of the Court of Probate Act reveals (1) that the exclusive practice of the civilians was preserved in all non-contentious cases,[4] (2) that the civilians were as easily empowered to buy new property as to sell old property, and to apply income from property to the maintenance of their corporate body,[5] and (3) that nothing contained in the Court of Probate or Matrimonial Causes Acts affected in any way the monopoly still enjoyed by the civilians in practice before the Admiralty and Prize Courts and the yet-extant Ecclesiastical Courts. No one could argue that the doctors might have continued to practise law in the manner enjoyed under the probate and divorce monopolies, but it is

[1] Parl. Paper [1859] (19) xxii (H.C. 20 January), p. 11.
[2] Parl. Paper [1859] (19) xxii, pp. 6–16.
[3] Holdsworth, *H.E.L.*, vol. 12, p. 49.
[4] See Court of Probate Act, 1857, §40.
[5] Court of Probate Act, 1857, §116.

equally fallacious to assume that the purposes for which the College was established could no longer have been carried out. The statement that 'property had been purchased by its members' is incompatible with the fact of a corporate existence, confirmed in the statement that 'the *College* had never performed any educational functions', which in turn places a very narrow interpretation upon the function of the College in sustaining a body of learned civilians, many of whom were also great teachers and scholars, for upwards of three hundred years.

Dr Lee's plea to the Visitors was of no avail, and on 18 March 1858, the Fellows met for the reading of the engrossment of a deed constituting five of them trustees for the liquidation and distribution of the entire assets of the College. Both Dr Lee and Dr Tristam attempted to delay the adoption of the deed, but they were outvoted, and the seal of the College was affixed.[1] Still determined to avert extinction of the College, Dr Lee petitioned the new Home Secretary—the Government having changed since passage of the 1857 Acts—to initiate legislation to repeal §§116 & 117 of the Court of Probate Act and replace those sections with provisions which would have made Doctors' Commons Hall the probate courthouse, have re-vested the property covered by the deed in the College, and have amended the charter so as to open membership in the College to Doctors of Law of any Universities of the United Kingdom.[2] In this too, Dr Lee was unsuccessful, and after June 1858 he appears to have given up the fight.

Dr Lushington had in 1833 advocated opening the bar of Doctors' Commons to the common lawyers, a move which he felt would stimulate competition;[3] as it became apparent that the civilians were doomed to extinction, there was no point in further maintaining their monopoly over Admiralty practice, and so, with the passage of an act in 1859 which enabled Serjeants, Barristers, Attorneys and Solicitors to practise before the Admiralty Court,[4] the civilians became completely open to competition save in the Ecclesiastical Courts, where their peculiar expertise in the canon law was itself a sufficient barrier to competition.

It was the admission of the common lawyers to practise in

[1] Parl. Paper [1859] (19) xxii (H.C. 20 January), p. 17.
[2] *Id.*, pp. 1–18, and esp. pp. 17–18.
[3] Parl. Paper [1833] (670) vii (H.C. 15 August), p. 49.
[4] High Court of Admiralty Act, 1859.

Admiralty that necessitated the 1859 Rules, which attempted to lay a complete procedural scheme before the new members of the Admiralty bar. This recodification, it might be added, gave to Rothery and Dr Lushington an opportunity to extend the printing requirements, over which controversy had died with the events of 1857–8, and thereafter it was necessary for each party to cause one hundred and fifty copies of the proceedings to be printed, of which seventy were filed and forty delivered to the opposing party.[1] This almost unbelievable requirement was rather belatedly condemned as a 'needless extravagance' by the Evershed Committee in 1951,[2] which perhaps served to placate a few restless proctorial ghosts in Knightrider Street.

So Doctors' Commons died by its own hand, with the shadow of mammon casting its pall over an otherwise glorious existence. Upon the doctors' vote to surrender, 'it is said that . . . the rooks, which some held to embody the spirits of departed civilians, forthwith forsook the trees in the College garden.'[3] As for the Admiralty Court, it continued to sit in the Hall of Doctors' Commons until early in 1860, when by Order-in-Council it was moved to Westminster Hall.[4] The Admiralty Registry is said to have moved to Somerset House in 1859,[5] but since it was still in 1867 giving its 'return address' as Doctors' Commons,[6] there is considerable doubt as to its complete removal until the termination of Dr Lushington's judgeship. The Common Hall of Doctors' Commons was, at any rate, demolished in 1861,[7] and the splendid library was dispersed, many of the volumes remaining today in the Admiralty Registry or in the storage basement of the Royal Courts of Justice.

Viewing the wreckage of this great institution of the civil law, one is struck by a final irony. The Doctors, in doing so excellent a job of exterminating themselves, probably helped to do likewise for their ancient rivals the Serjeants-at-Law. For, following the pattern almost exactly, the Order of the Coif was dissolved in 1877, Serjeants' Inn was sold along with other property of the guild, and the proceeds were distributed to the membership.

[1] 1859 Rules, r. 101; see Coote, 1st ed., p. 136*s*.
[2] Sup. Ct. Practice Comm., *Second Report*, Cmd. No. 8176, at 13–14, ¶¶30, 31 (1951).
[3] Senior, p. 110.
[4] See Roscoe, *Studies*, p. 3.
[4] *Id.*, p. 7.
[5] See Return to H.C. by Rothery, Adm. Reg'r., 28 May 1867, p. 1.
[7] Roscoe, *Studies*, p. 3.

The finest monument to Dr Lee's argument was probably the notable success achieved in practice and scholarship by a number of civilians following the dissolution of Doctors' Commons, and the somewhat chaotic upheavals in the civil and canon law following the civilians' final extinction.[1] The latter will be dealt with at a later stage, but of the former a word deserves now to be said.

The Proctors-in-Admiralty, who were paid as compensation for the loss of their livelihood a relatively insignificant sum equal to half of the yearly average of their income from probate work over the five years preceding the 1857 Act,[2] were able to recover themselves and continue to practise in the Admiralty Court, as did several of the doctors.[3] The new practitioners from the common law were given the benefit of a new treatise on Admiralty jurisdiction and practice written specifically for them by a proctor, Henry Coote,[4] continuing in the tradition of scholarly civilians such as Browne, Holt, and Van Heythuysen—whose works appear to have been overlooked by the Court's most eminent historian[5]—and Edwards. Scholars of the Court's early history were given a most valuable work by Dr Travers Twiss,[6] who edited Rolls series of the *Black Book of the Admiralty* in four volumes during the 1870s; Twiss also became the leading advocate at the Admiralty bar after the fall of Doctors' Commons, and was the last Queen's Advocate.[7] Such achievements effectively counter the assertion that the civilians had become 'superfluous', and the Doctors' Commons had 'outlived by many years its *raison d'etre*',[8] for as a body of learned specialists, so deferred to that scholars of legal systems ruled by the civil law felt it necessary to apologize to the doctors for presumptuousness in publishing treatises on maritime and international law,[9] it has since been unequalled in its eminence and unreplaced in its sphere.

In case it might be thought that the necessity for a college of civilians has been belied by the success of a system of Admiralty Law in nations such as the United States, which have never possessed such an organized body, certain contrasts ought to be illustrated. In the case of the United States, where a system of

[1] See Moore, pp. 128–9.
[2] See Roscoe, *Studies*, pp. 8–11.
[3] See Marsden, 'Six Centuries', p. 176.
[4] See Coote, 1st ed., intro., p. vii.
[5] See Fifoot, *Letters of F. W. Maitland*, Nos. 14, 100, 186.
[6] Roscoe, *Studies*, p. 8; *H.C.A.*, p. 6.
[7] Senior, p. 111.
[8] Court of Probate Act, 1857, §105.
[9] See, *e.g.*, Reddie, intro., p. xxv.

ecclesiastical jurisdiction could never have developed owing to the absence of an established church, there was no need for canonists, and the civil law was restricted in application to matrimonial and Admiralty matters; as the former of these was reserved exclusively to the jurisdiction of the States, and the latter exclusively to the Federal jurisdiction, a bar which unified both was also an impossibility.

Despite the unpopularity of the Vice-Admiralty Courts as instruments of the British Exchequer, and resentment of the lack of trial by jury,[1] both the substantive[2] and procedural[3] aspects of the civil law survived into the Admiralty Law of the United States, with a clear recognition of both its European origin and its British transmission.[4] Owing, however, to the decentralization of both the Colonial Vice-Admiralty and Federal Admiralty Courts, and the practice of civil law in those Courts being restricted solely to Admiralty matters, it is manifest that during the eighteenth and early nineteenth centuries no lawyer could have sustained himself by limiting his practice to the civil law; therefore, though the legal profession was then divided in America as it was then and is today in England, Proctors-in-Admiralty were also Attorneys and Solicitors-at-Law, and Advocates in Admiralty were also Counselors at Law.[5] Fusion of the Admiralty branch of the profession was underway early in the latter half of the nineteenth century,[6] but even in the present day, with a completely integrated bar, it is necessary for an American lawyer to be first admitted to practise as a Solicitor, Attorney and Counselor before he may qualify as a Proctor and Advocate in Admiralty.

Without an organized body of civilians of its own, the American Admiralty bar came to rely for practical guidance upon the examples set by Doctors' Commons in England,[7] and it was necessary as well—as indeed it yet is—for Admiralty lawyers in the United States to supplement their training in the common law by making 'the civil law the subject of closest study'.[8]

The evolution of the American legal system thus produced a

[1] See Ubbelohde, pp. 143, 199.
[2] U.S. Constitution, Article III, §2, cl. 1.
[3] Judiciary Act of September 24, 1789, ch. 20, §2.
[4] See, *e.g.*, Dunlap, p. 85.
[5] See Betts, pp. 9–14.
[6] See Parsons, p. 358.
[7] See Conkling, p. 409, n. (*a*).
[8] Betts, intro., pp. vii–ix.

bar which was less expert in the civil and international law than was Doctors' Commons, yet in general more educated in those fields than the common lawyers in England; this fact was noted early in the nineteenth century by a member of the College of Advocates,[1] and again after the fall of Doctors' Commons by the author of an English text on maritime legislation,[2] both observations being put forth in the course of arguments establishing the importance of Doctors' Commons as an English national institution.

While some Americans mastered the civil law—Judge Ware is a notable example[3]—there was an unevenness of quality in this regard which does not appear to have afflicted Doctors' Commons. A few eminent American civilians of the early nineteenth century, such as Dr Henry Wheaton (whose *Elements of International Law* survived not only many editions but many translations as well), were accused of mixing 'national bias' with scholarship,[4] and others, though competent to treat of the Admiralty Law of their day, made historically inaccurate assertions concerning the civil law and its application in England.[5] This must not be taken to intimate that the knowledge of the English civilians was perfect —indeed, Dr Lushington's holding that Admiralty could not take cognizance of general average because it was based upon a common law lien[6] (rather than stating simply that this exercise of the Admiralty jurisdiction had been repeatedly prohibited by the courts of common law) demonstrates an ignorance of the *Lex Rhodia* and its adoption into the Roman Law,[7] to say nothing of the references made thereto by such jurists as Selden,[8] which may seem remarkable in view of the extensive training of the civilians in the Digests.

Such an isolated example, however, does not disprove the value to the English legal system of the College of Advocates, nor can it offset the uneasiness of some who, observing the usefulness of the civilians in matters such as *R. v. Serva*,[9] wondered what

[1] Parl. Paper [1833] (670) vii (H.C. 15 August), p. 68
[2] Wendt, intro., p. xxiv.
[3] See, *e.g.*, *The Bee*, 3 Fed. Cas. 41 (No. 1219) (D.Me. 1836).
[4] See, *e.g.*, Reddie, intro., p. xxiv.
[5] See, *e.g.*, Parsons, p. 159, n. 1.
[6] *The Constancia*, (1846) 2 W. Rob. 487.
[7] Digest 14.2.1.
[8] See Senior, pp. 15–16.
[9] [*The Felicidade*], (1845) 2 Car. & K. 54; *The Times*, 17 Nov. & 4 Dec.

portent the fall of Doctors' Commons held for the future of English justice:

> The great importance of this point [the lack of expertise in the civil law by the common lawyers] ought not to be lost sight of, as in case, by certain positive enactments, the Judgeship in the Admiralty Court, and a seat in the Appeal Court, should not be reserved for learned civilians, it is difficult to see, not only how these courts can be efficiently administered, but where the Foreign Office and the Lords of the Admiralty, as well as the general public, are in future to choose their advisers in matters of international and general Maritime Law, whom, for centuries, they have been accustomed to look for amongst the civilians.[1]

Whether or not such apprehension was well founded is a question which it is as well not to attempt to answer at this point, for at the time it was voiced Doctor's Commons was still fresh in memory and several of the civilians were still active in the practice of Admiralty.

Thus the civilians as an English institution were destroyed with Doctors' Commons; but like the branches of an ancient tree newly uprooted, a few of the doctors continued to live and to blossom, employing their resources as before. What they managed to accomplish while in that state is important to the development of Admiralty Law, for it was under their care that the Admiralty Court underwent, in terms of its organization, its great transition from the civil to the common law—and it was under their care that the Court retained its civilian character despite that transition.

[1] Wendt, intro., p. xxiv.