MARITIME LIENS IN THE CONFLICT OF LAWS

INTRODUCTION

The problem posed in this article is whether rights which in the forum[1] would constitute a maritime lien are to be created by the application of the proper law[2] to a transaction or by the application or by the application of the *lex fori* to that transaction. A solution to the problem must be found (a) where the application of the proper law to a particular transaction would lead to the creation of rights which amount to a maritime lien but where the application of the *lex fori* to that transaction would not lead to the creation of a maritime lien, and (b) in the converse case, where the application of the proper law to a transaction would not lead to the creation of rights which amount to a maritime lien but where the application of the *lex fori* would lead to the creation of a maritime lien.[3] This problem is a particularly pressing one because firstly, in the area of maritime law, the laws of different countries do in fact give different rights from similar transactions[4] and secondly, ships are extremely mobile and thus forums are often unpredictable at the time of a transaction.

The purpose of this article is firstly, to identify and distinguish from the problem posed certain other processes that a court may have to undertake before it can recognize and give effect to a maritime lien; secondly, to identify the traditional approach to and objectives of the classification into substance and procedure which will be seen to lie at the heart of the problem posed; thirdly, to discuss in the light of this analysis cases from various jurisdictions which shed light on the problem; and, finally, to suggest an approach to the problem which, it is thought, is better designed to further the identified objectives than the approach traditionally adopted.

[1] It is assumed throughout this article that the forum court follows English law, at least in the areas of maritime law and the conflict of laws that we are concerned with.

[2] This article will deal primarily with maritime liens which purport to have been created by contracts. The law governing the substance of the contract will be called the "proper law". Some of the older authorities refer to the *"lex loci contractus"* or just the *"lex loci"*. This should not blur the fact that the foreign law is that law selected by the forum's choice of law rules as the law applicable to the contract. It is this latter concept that is important in the present context.

[3] It is not proposed to distinguish between these two situations in the present analysis. It might be argued, however, that in a "result-selecting" system a court should distinguish between the situations for application of the *lex fori* in (b) which give the claimant the *benefit* of the *lex fori* whereas in (a) the claimant *suffers* from the application of the *lex fori.*

[4] E.g. American maritime law gives a necessaries man the "right to follow" a ship into the hands of an innocent purchaser whereas English maritime law does not. See e.g. *The Ioannis Daskalelis, infra,* note 53. The term "American law" is used in this article because in the areas dealt with there are no "plurilegislative" problems.

THE FITTING-IN PROCESS[5] *DISTINGUISHED FROM THE "PROBLEM POSED"*

If rights that purport to constitute a maritime lien are found to be created by the application of the proper law of the contract, those rights must be analysed by the forum court to decide whether or not such rights amount to a maritime lien in the forum. This is quite distinct from the process of the creation of such rights. This process of fitting-in is most obvious when the foreign proper law gives rights which are not called a maritime lien by that proper law, as, for example, occurred in *The Colorado.*[6] French law did not have the term "maritime lien" at all, but it is at least arguable[7] that the bundle of rights that resulted from applying French law to the transaction were investigated by the English court and found to be a bundle of rights sufficiently similar to the bundle of rights that the forum called a maritime lien and that therefore those rights could be placed in the forum's category of maritime liens. That this must be done where the rights derived from the application of foreign law are not called a maritime lien should not obscure the fact that this fitting-in process must equally be undertaken where the rights resulting from the application of foreign law *are* called a maritime lien by that foreign law. The forum court should, in all cases, analyse the nature of the rights created by the application of the foreign law and decide whether that bundle of rights is sufficiently equivalent to the bundle of rights that the forum calls a maritime lien. This fitting-in process may occasionally be imprecise but it is not uncommon[8] in the conflict of laws and it deserves further study.[9]

The fitting-in process must be clearly distinguished from the problem posed. The fitting-in process is only required when the creation of rights has already been determined by the application of a foreign proper law.[10] That this is so emphasizes that where the fitting-in process is undertaken by a court, that court must have determined the creation of the rights by the application of the proper law to the transaction and not by the application of the *lex fori* to the transaction. The role of the *lex fori* here is only to define the sort of rights that constitute the forum category "maritime lien".

PRIORITIES DISTINGUISHED FROM THE "PROBLEM POSED" AND THE FITTING-IN PROCESS

Many of the cases which will be discussed[11] were actions to determine the priority of creditors to the proceeds of the sale of a ship. A creditor claimed that he had a maritime lien and thus should have priority over certain other creditors. It is suggested that there

5 The term "fitting-in" is here adopted because it is thought that it describes in plain English the process concerned. See the use of the term in *The Halcyon Isle* [1978] 1 M.L.J. 189; Lipstein [1972 (B)] C.L.J. 67, 81. Called the process "substitution" following continental terminology. See e.g. Lewald. (1939) III Hague Recueil 1, at p. 130. *"…un precede que je voudrais caracteriser par le terme de substitution."*

6 [1923] P. 102.

7 See *infra,* for further discussion.

8 See e.g. *Tursi v. Tursi* [1958] P. 54; *In re Marshall* [1957] Ch. 507.

9 For recent discussions in English see: Mann (1971) 1 Hague Recueil, 135 *et seq;* Nussbaum 40 Col. L.R., 1461, at p. 1465; Lipstein *supra,* note 5.

10 See Lipstein *supra,* note 5 at p. 82.

11 *Infra.*

is a clear distinction between the processes involved in a court recognising that a claimant has, for its purposes, a maritime lien and the process of determining the priority to be accorded to such a maritime lien.[12] Even Dicey and Morris who feel that, as a general rule, the *lex fori* governs both the recognition processes and the priority ranking process, accept that this distinction exists.[13] For the purposes of this article it is accepted that the *lex fori* must be used to rank claims;[14] but, as the processes involved in the recognition of a maritime lien and the process of determining the priority of such a maritime lien are quite separate and distinct, the fact of the use of the *lex fori* for the latter process should not lead a court to use the *lex fori* in all the recognition processes.[15] Once the role of the *lex fori* in the fitting-in process and the role of the *lex fori* in determining the priority to be accorded to claims are distinguished from the issue of the creation of rights that may constitute a maritime lien, the analysis of the problem posed becomes clearer because one can then disregard all considerations that relate only to the other processes.

SUBSTANCE OR PROCEDURE

The problem posed is, in essence, a question of substance or procedure. The substantive rights of the parties to a contract which is governed by a foreign proper law are governed by that proper law whereas matters appertaining to procedure are governed by the *lex fori.*[16] Thus if the creation of rights that may constitute a maritime lien is regarded as a matter of substance then the proper law should be applied to determine the creation of such rights but if it is regarded as a matter of procedure the *lex fori* should be applied.

The Traditional Approach

As will be seen,[17] the traditional approach of courts following English law has been to focus attention on the bundle of rights which in the forum constitute a maritime lien and by analysis of the nature of these rights to determine whether maritime liens are procedural or substantive. The classification into substance or procedure is thus made by analysis of the nature of the forum's rights. This approach has not always led to the same conclusion.[18] It is proposed to analyze further the processes involved when maritime liens are classified, in the sense of this approach, as substantive. It is submitted that it is inadequate, conceptually, to ascertain merely that the foreign proper law grants what it calls a "maritime lien". Two processes

12 See e.g. Bankes L.J. in *The Colorado supra* note 6 at p. 106.

13 *The Conflict of Laws* (9th Ed. 1973), pp. 1113 & 1114.

14 See e.g. *The Colorado, supra,* note 6. It is suggested however that the rationale for the application of the *lex fori's* priority system is not ".. . that the procedural convenience of the *forum* demands this course, but simply that there is no good reason for applying one rather than the other of the two conflicting leges causae", *(supra,* note 13 at p. 1114) and that therefore in a case where all claims are governed by the same foreign law it might be argued that that foreign law's priority system should be applied.

15 Cheshire, *Private International Law* 9th Ed. 1974 suggests at p. 697 that failure to distinguish these processes has been a cause of courts applying the *lex fori* to determine the *creation* of rights from a transaction. Such cases must, it is thought, be suspect. See e.g. *The Tagus, infra* note 49.

16 *Ibid.,* at p. 683.

17 *Infra.*

18 E.g. *The Halcyon Isle* (Kulasekeram J.) [1977] 1 M.L.J. 145 (procedural); Court of Appeal [1978] 1 M.L.J. 189.

must be followed after the application of the foreign proper law before a claimant should be entitled to rank in the forum as the holder of a maritime lien.

Firstly, the applicable area of the *foreign law* must be ascertained. The forum conflicts' rule directs the application of foreign substantive rules. It is, thus, essential to delimit the foreign law to areas of substance. If, for example, the foreign law had determined that, *for its purposes,* maritime liens are procedural, should this lead the forum court to ignore such rights because they are not substantive? It would be necessary for the forum court to decide whether, *for its purposes,* a foreign classification of this nature should prevent the application of foreign law to that issue as some exponents[19] of "secondary classification" have advocated. Alternatively the court might adopt the method[20] of classifying the foreign rule by analysis of that rule in its foreign context, ignoring the prior classification of the forum rule. The court may even regard its classification of its own rule as determinative of the classification of the foreign rule.[21] Nonetheless, whatever method be adopted,[22] if the traditional approach is favoured by a court some delimitation of the foreign law is conceptually required, for the forum has, prior to such delimitation, only concluded that its own rule is substantive and even if this conclusion is taken to determine the classification of the foreign rule such classification is nonetheless necessary before the applicable area of foreign law can be finally determined.

The necessity of classifying the foreign rule is, it is thought, often obscured by the second process which the court must undertake before allowing a claimant to rank as the holder of a maritime lien. This process is the fitting-in process.[23] It is suggested that, if the foreign rights can be fitted-in to the forum category of maritime liens then, given the purposes of the classification process which will be formulated,[24] the court would be justified in recognising those foreign rights. The court would, in other words, classify the foreign rights as substantive. Thus, if the traditional approach be adopted,[25] those foreign rights which can be fitted-in to the forum category of maritime lien, will be classified as substantive. That this may be the test of substance should not obscure the conceptual difference between the classification of the foreign rule and the fitting-in process. Rights may be regarded as substantive because they can be fitted-in but equally only those foreign rights which have been classified as substantive may be fitted-in. In the event the two coincide but they are theoretically distinct processes,

The Purposes of Making the Classification into Substance or Procedure

In many instances it may be perfectly clear that for whatever purpose one may wish to classify a rule as procedural or substantive, that rule is procedural. Equally it may be perfectly clear that in

19 E.g. Robertson, *Characterization in the Conflict of Laws* (1940), p. 246.
20 Such as was adopted in *Re Cohn* [1945] Ch. 5.
21 This method is exemplified by *Ogden* v. *Ogden* [1908] P. 46.
22 A different method will be suggested for use in this area if the traditional approach is in fact adopted by a court. *Infra.*
23 *Supra.*
24 *Infra.*
25 *Infra,* for discussion of an alternative approach.

all cases a rule is substantive. However in the borderline area between substance and procedure it is essential to clarify the terminology that we use and the purposes of making the distinction. Only in this way can a rational classification in hard cases be attempted.

It is by now trite to refer to that great American lawyer W.W. Cook's powerful discussion of procedure and substance in his outstanding book,[26] *The Logical and Legal Bases of the Conflict of Laws,* but it is thought that in the light of some recent cases on maritime liens[27] it merits repetition. Substance and procedure, wrote Cook,[28] are not divided by a "line" which has "some kind of objective existence." To approach the classification in this way is to "… divert our attention from the fact that we are thinking about the case precisely because there is no line already in 'existence' which can be discovered by analysis alone."[29] He thus highlighted the crucial point that an issue may be procedural in one context and substantive in another. Thus he wrote:[30] "Only after the most careful consideration ought it to be concluded that decisions relating to one of these problems are to be followed as 'precedents' for the decision of cases in another group." From this we may conclude that there are severe pitfalls to be avoided if one attempts to argue for a particular classification in the case at hand by reference to cases decided with different purposes in mind. I shall call such arguments[31] the use of "in-relief"[32] precedent.

Cook suggested, given the relativity of terms, that the court should look to the purpose of drawing a line in a particular case. There are two key questions that must be asked in order to lay bare the purposes of the particular classification into substance and procedure:

(a) Why does one draw the line at all? The answer that Cook gave to this was that it is: "… quite inconvenient for the court of the forum, though not unfair to the litigants concerned, to take over all the machinery of the foreign court for the 'enforcement', as we say, of the substantive rights."[33] So, as Morris wrote:[34] "The primary object of the rule that procedural matters are governed by the *lex fori* is to obviate the inconvenience of conducting the trial of a case containing foreign elements in a manner with which the court is unfamiliar."

(b) What purposes should rules relating to conflict of laws cases serve? This question directs one to consider the objectives of rules of the conflict of laws generally. Cook wrote:[35]

26 (1942) Chap. 6. This essay was first published in (1933) 42 Yale L.J. 333 but references in this article are to the former citation.
27 E.g. *The Christine Isle, infra,* note 17, *The Halcyon Isle, infra,* note 25.
28 *Supra,* note 26 at p. 157.
29 *Ibid.*
30 *Ibid,* p. 166.
31 When we encounter them in discussing the cases. E.g. cases cited *supra* note 27.
32 The term is derived from a statement of Kulasekaram J. in *The Halcyon Isle* [1977] 1 M.L.J. 145 at p. 147. Referring to the judgment of Atkin L.J in *The Tervaete infra,* note 4, he said that this "… shows up *in relief* the essentially remedial character of a maritime lien." (my italics).
33 *Supra,* note 26 at p. 166.
34 *The Conflict of Laws* (1971), p. 456.
35 *Supra,* note 26 at p. 166.

> "In determining the legal consequences of certain conduct or events it has seemed reasonable to apply 'foreign substantive Law' because of some factual connection of the situation with the foreign state;... in many cases a refusal to accept the foreign rule as to a matter falling into the doubtful class will defeat the policy involved in following the foreign substantive law."

We may agree that "the vested rights theory is dead"[36] but it may be said that as a *motive* for the consistent application of foreign law it retains some vitality.[37] As a "theory" it is inadequate but it emphasizes the purpose of conflict of laws rules of providing some international consistency and uniformity.

It must be conceded that even severe restriction of the ambit of "procedure" will not give total uniformity; for, in the cases we are dealing with, for example, priorities will be decided by the forum's system and the fitting-in process involves categorization into the forum's categories, in all cases there may be different choice of law rules in different countries for ascertaining the proper law, and the public policy of the forum is also ever present. Nonetheless, the purpose to be achieved is *some* uniformity and consistency and devices to increase the chances of achieving such objectives should be given serious consideration.

Cook concluded that the problem was best stated as: "How far can the court go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself."[38]

It is suggested that where the traditional approach to maritime liens outlined above is adopted courts should (a) beware of "in-relief" precedents, and (b) undertake the classification process both of the forum rule and of the foreign rule (if the forum rule is regarded as inapplicable because it is seen in this context as substantive) in the light of the basic purposes of conflicts rules in general and the particular purpose of the rule that procedure is governed by the *lex fori.* It is thought that if these premises are articulated parochial results will be less likely to occur.

THE CASES

In the light of the foregoing analysis it is proposed to analyse the relevant authorities from various jurisdictions which purport to follow English law in this area.

First Attempts in the English Courts

In the *Milford*[39] the court was faced with a suit against the freight of the vessel by the master of the vessel for his wages. In order to ascertain whether there was a "right of lien on freight" Dr. Lushington decided that he should apply the *lex fori* as opposed to the *lex loci contractus.* He decided that, as the *lex fori* governed, then, according to that law, the master did indeed have a similar right to seamen, that is, to a lien. Although it is unclear from the case

[36] *Supra,* note 34 at p. 523. Cook's writings were one of the main causes of its death.
[37] E.g. Lipstein, *supra,* note 6, at p. 70.
[38] *Supra,* note 26 at p. 166.
[39] (1858) Swab 362.

what the relevant American law would have held [40] had it been applied, it can probably be taken, for the sake of argument, that that law gave no lien to the master. This means, therefore, that the court gave the master a lien where none would have been given by the proper law.

Let us analyze Dr. Lushington's reasons for reaching this decision. He said: "This is a question of great importance and of some difficulty..."[41] and suggested that:[42]

> "It is impossible not to be struck with the inconveniences which might ensue if the court is to be governed by the *lex loci contractus;* in every case in which a foreign seaman or master sued, the court would have to enquire into the contract and into the law of the country under which it was made."

In considering this case it is vital to remember that it was decided in 1858. The reluctance of courts at that time to look to the foreign law should be emphasized when such cases are reviewed today.[43] It is instructive, nonetheless, that Dr. Lushington was clearly influenced in his decision to apply the *lex fori* to determine the creation of the lien by the "inconvenience" involved in an enquiry into foreign law. Any enquiry into foreign law is to some extent "inconvenient" but Dr. Lushington conceded that if he had "... to construe a contract its meaning and extent must doubtless be governed by the *lex loci contractus."* [44] He decided however that "... it is a question of remedy, not of contract at all."[45] And that "... the remedy must be according to the law of the forum in which it is sought."[46]

It is suggested that this decision shows clearly how supposed "inconvenience" in ascertaining and applying foreign can lead a court to decide in a doubtful case that its own rule of law is procedural and therefore applies and can thereby avoid such "inconvenience." It is submitted however that, as already outlined, "inconvenience" alone should not be determinative of the classification but should be weighed against the positive purpose of the rules of the conflict of laws. This decision may regarded as a case in which the court determined that the creation of a maritime lien was a matter appertaining to procedure and thus governed exclusively by the *lex fori.* However, it is suggested that the supposed "inconvenience" of applying the foreign proper law, even if real enough in 1858, would be much less so today and that, in any case, the court failed to give adequate weight to the general purpose of conflict of laws rules.

40 *Van Bokkelin* v. *Ingersoll 5* Wendell's R. 315 (No lien); *The Spartan,* 1 Ware's R. 162 (lien). If American law gave a lien then there was a "false conflict".

41 *Supra,* note 39 at p. 364.

42 *Ibid,* at p. 365.

43 Cheshire wrote: "In fact we can go further and say that a decision given in the middle of the last century is often suspect.... If we are content to justify an opinion of today upon an early decision, however precise and unambiguous, without taking into account more recent developments of the subject as a whole, nothing but confusion and chaos can ensue." *Supra,* note 15 at p. 37.

44 *Supra,* note 39 at p. 366.

45 *Ibid.*

46 *Ibid.*

In the *Jonathan Goodhue,*[47] Dr. Lushington affirmed his decision in *The Milford* but he repeated "… that was a case of great doubt and difficulty."[48] *The Milford* was to have important consequences in 1902 when Phillimore J. decided *The Tagus.*[49] The claimant was the Argentinian master of an Argentinian vessel. He was claiming priority to a mortgagee. Under Argentinian law (the proper law of his contract) he had only a maritime lien for the wages due from his last voyage. Under English law (the *lex fori)* he had a maritime lien for all his wages. It was not contested that he had a right *in rem* and a right to sue, but his priority to the mortgagee was at issue. Phillimore J. went straight to the point and said: "I am of the opinion that the *lex fori* applies, because we are construing an English Statute with regard to property which is within the English Jurisdiction, as was decided in *The Milford:* both upon principle and upon authority I so hold".[50] He then went on to discuss whether or not *The Milford* had in fact been correctly decided and should be supported. It was, however, a discussion that related not to the decision in *The Milford* that the *lex fori* should apply, but rather, exclusively, as to whether it was a correct decision on the *lex fori* itself. The sole discussion of the problem posed was the statement quoted above. It would not seem to be a very reliable basis on which to reach a decision today. The proverbial cart comes before the horse. The court would not have been construing the statute (given that it had, as it did, jurisdiction) unless the *lex fori* applied, and the presence of property in the jurisdiction, should not necessarily lead to the application of the *lex fori.* With respect, *The Milford* may have been authority for applying the *lex fori* but it was not, it is suggested, authority for Phillimore J.'s statement. Nonetheless, the Argentinian master was given a maritime lien for all his wages.

In 1923 the Court of Appeal in England decided *The Colorado.*[51] This case deserves special attention because it has been the object of conflicting judicial interpretation. The trial judge in *The Halcyon Isle* in Singapore said:[52]

> "I do not agree that the decision in *The Colorado* went so far as to be authority for the proposition that a maritime lien is a substantive right and if a claim under a foreign contract gives rise to a maritime lien under the proper law of that contract... then the English Court would recognize that maritime lien…."

On the other hand, Ritchie J. delivering the judgment of the Supreme Court of Canada in *The loannis Daskalelis* said:[53] "In the case of *The Colorado*... the principle of recognizing that the nature of the right *in rem* fell to be determined according to the *lex loci* was reasserted."

In *The Colorado* the court had to decide whether the holders of a French hypotheque should rank above or below an English necessaries man in the order of payment to creditors out of the proceeds of the sale of the ship. The holders of a mortgage or a maritime lien in

[47] (1858) Swab, 524.
[48] *Ibid,* at p. 525.
[49] [1903] P. 44.
[50] *Ibid,* at p. 51.
[51] *Supra,* note 6.
[52] [1977] 1 M.L.J. 145 at p. 149.
[53] *Todds Shipyards Corp.* v. *Altema Campania Maritima S.A. et al.* (1973) 32 D.L.R. (3d) 571, at p. 575.

English law rank above necessaries man. According to French law, apparently, the holder of hypotheque would rank below a necessaries man. The court had thus to decide firstly whether the priority system of the forum or that of the proper law should be used and secondly to ascertain the category in which the holders of the hypotheque should rank.

Bankes L.J. said:[54] "This, in my opinion, leaves the question quite open as to what the rights created by the so-called mortgage deed are. This question must be determined according to French law, as the contract was made in France, though the question of priority must be decided by English law."

He dismissed the necessaries man's claim that the French priority system affected the rights under the French mortgage because that system was concerned with "remedies". It was irrelevant to "… ascertaining what the rights of the respondent are under the document referred to in these proceedings as the French mortgage."[55] It is submitted that this shows firstly, a decision that the English priority system must govern priorities. Secondly, that the rights derived from the mortgage deed are to be ascertained by the application of the proper law. But thirdly, a decision that remedial rights under the proper law are to be disregarded in deciding on the nature of the rights derived from the application of the proper law to the transaction. It was, thus, a delimitation of the applicable area of the chosen foreign law. So, ignoring French remedies, Bankes L.J. decided that the right derived from the application of French law to the transaction was a right that "… though not capable of exact description in terms applicable to well recognised English rights, it had yet attributes which entitled it to rank on a question of priorities in the same class as a maritime lien or the right created by an English mortgage."[56] He, thus, fitted-in the foreign rights into the forum category and then used the forum's priority system to rank the holders of the French hypotheque above the English necessaries man.

Scrutton L.J.'s judgment is less clear. "[P]riorities of creditors … are dealt with by the *lex fori,* and not by the law of the countries where the debts are contracted, except so far as such laws are necessary to establish that there are debts."[57] Here again the *lex fori's* priority system was clearly adopted, but the difficulty of the judgment is that it does not make explicit whether the statement that: "The nature of the right may have to be determined by some.. ."[58] law other than the *lex fori* which is to determine the nature of the remedy, is of general application to claims to maritime liens which purport to derive from a transaction which has a foreign proper law, or whether this statement was meant to apply only where the transaction is one with which the forum court is not familiar and thus has no method of "applying" the *lex fori* to it. The statement itself is not explicitly limited to unfamiliar transactions but immediately after the statement Scrutton L.J. goes on to cite *The Milford* and *The Tagus* as illustrations of the

54 *Supra,* note *6* at p. 106.
55 *Ibid,* at p. 107.
56 *Ibid.*
57 *Ibid,* at p. 109. This statement was appropriately qualified but *was* applicable to cases where "… an English court divides amongst creditors the proceeds of a ship arrested and sold in England". *Ibid.*
58 *Ibid,* at p. 108.

statement. While both these cases support the determination of the remedy by the *lex fori,* it is clear from our discussion of those two cases[59] that they do not support the conclusion that the nature of a right which purports to be a maritime lien should be determined by application of the proper law. It has thus been suggested[60] that reference to the proper law should only occur where the transactions are unfamiliar to the *lex fori.*[61] In *The Colorado* itself Scrutton L.J. decided, by reference to French law, the nature of the right derived from the French mortgage. "[S]uch a right" he said,[62] "is the same as a maritime lien as described by Mellish L.J. in *The Two Ellens,*[63] by Gorell Barnes J. in *The Ripon* City,[64] and by this court in *The Tervaete."*[65] He thus fitted the foreign right into the forum category.

Atkin L.J. found the case to be one of "considerable difficulty."[66] "The court may," he said[67] "have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the *res* at all". A maritime lien, he suggested, was an intermediate case between right and remedy but he said:[68] "Nevertheless, in determining whether there exists a maritime lien the Court will apply the *lex fori,* and will give effect to the lien as it exists by English law: see *The Milford* and *The Tagus".* Now, that effect is given to a maritime lien by English law this would seem to be in accord with the views of the other judges. Questions of ranking are to be decided by the *lex fori.* But what does the learned judge mean by determining the existence of a maritime lien by application of the *lex fori?*

(a) Does he mean that only transactions which under the *lex fori* give rise to maritime liens shall result in maritime liens regardless of whether or not rights equivalent to a maritime lien are given by the proper law? This is the view that is generally taken of *The Milford* and *The Tagus.* But if this is the correct view of Atkin L.J.'s statement it becomes necessary to create the exceptions already mentioned of allowing reference to foreign law where the transaction is unfamiliar, for Atkin L.J. did refer to French law in this case. "I think myself", he said,[69] "that the question is one of fact — namely the nature of a hypotheque on a ship as created by French law." Or,

(b) Does he mean that rights derived from the application of the foreign proper law must be equivalent to those rights that the *lex fori* calls a maritime lien in order to rank in the forum in the category maritime lien? This conclusion would seem to be in line with the reasoning of Bankes L.J. and arguably Scrutton L.J.and is possibly justifiable on the grounds that Atkin L.J, said "exists" and not "has been created", thus implying perhaps that the right would be created by the application of the foreign proper law. He appears to accept

59 *Supra,* see also: Price (1941) 57 L.Q.R. 409, 414.
60 Dicey and Morris, *supra,* note 13 at pp. 1113 & 1114.
61 See *infra,* for a discussion of the merits in principle of such a distinction.
62 *Supra,* note 6 at p. 109.
63 (1872) L.R. 4 P.C. 161.
64 [1897] P. 226, 241.
65 [1922] P. 259, 264.
66 *Supra,* note 6 at p. 110.
67 *Ibid.*
68 *Ibid,* at pp. 110 & 111.
69 *Ibid,* at p. 111.

this approach, generally, for he refused to differ from the finding of the trial judge that the right created by the application of French law was a "... right closely resembling a maritime lien."[70] It must be conceded, however, that Atkin L.J. at another point in his judgment suggests that reference to the foreign proper law may only occur where the claimant alleges that his right is "... something other than a maritime lien... ."[71] It is submitted that these statements are contradictory. It is further suggested that his reference to *The Tagus* and *The Milford* need not prevent interpretation (b) because that reference can be taken as restricted to the giving of *effect*[72] to the lien as it exists by English law.

In conclusion it is submitted that all three judges were prepared to refer to the foreign proper law in order to ascertain the nature of the rights of the claimant and then to fit those rights into the forum category of maritime lien, and finally to rank priorities according to the forum's priority system. References by Scrutton and Atkin LJJ. to *The Milford* and *The Tagus* have, however, led some commentators[73] to suggest that reference to the foreign proper law to ascertain the nature of the rights should only occur in cases such as *The Colorado* itself where the court is faced with an "unfamiliar" transaction. It is submitted that this is by no means a necessary conclusion from the judgments of the two Lord Justices and is insupportable from Bankes L.J.'s judgment. Although ambiguity certainly remains it is thought that the broad tenor of the judgments does not support the distinction. It is proposed to provide further support for this conclusion by analysing the merits of such a distinction and thereby to show that the distinction cannot be supported in principle.

It is conceded[74] by proponents of the *lex fori* in this area that *The Colorado* requires ascertainment of the nature of rights resulting from an "unfamiliar" transaction by application of the foreign proper law. Once the nature of these rights has been ascertained they are regarded as constituting a maritime lien if they are equivalent to the rights called a maritime lien in the forum. In the light of the earlier discussion of the purpose of classifying into substance and procedure in the conflict of laws it is suggested that the conclusion must be drawn that it is not regarded as "inconvenient" to refer to foreign law to ascertain the creation of rights which are equivalent to the forum category maritime lien and then to fit them into that forum category. However, if it is not "inconvenient" in the case of an "unfamiliar" transaction, it must surely be conceded that it is not "inconvenient" in the case of a "familiar" transaction. It would seem to follow, therefore, given the premise of the purpose of classification, that there is no rationale for applying the *lex fori* to either "familiar" or "unfamiliar" transactions to determine the nature of the rights that result from the transactions. It has already been suggested that where it is not "inconvenient" to do so, and where it is not contrary to the public policy of the forum, the positive purpose of the conflict of laws is furthered (in relation to the distinction between substance and procedure) by allowing the application of the foreign law most

70 *Ibid,* at p. 112.
71 *Ibid,* at p. 111.
72 E.g. by applying the priority system of English law.
73 E.g. *supra,* note 60.
74 *Ibid.*

connected with the transaction to an issue. It is submitted, therefore, that despite ambiguity in *The Colorado* the court should not be taken as having drawn what is seen to be, in the light of these supposed purposes to be achieved, an indefensible distinction.

The foregoing cases have been analysed in some detail because it is thought that they provide the basis for three possible conclusions as to the law to be applied to determine the creation of rights that may be equivalent to the forum category of maritime lien:[75] 1. *Application of the lex fori to the transaction.* This is derived from *The Milford* and *The Tagus,* but can not be reconciled with the *decision* in *The Colorado.* It is submitted that as a general rule it is acceptable neither in principle nor upon authority. 2. *Application of the lex fori to "familiar" transactions but application of the foreign proper law to "unfamiliar" transactions.* This is derived from *The Colorado* and does not contradict the actual decisions in *The Milford* and *The Tagus.* It is submitted that although two of the judgments in *The Colorado* might be taken as suggesting this conclusion, this distinction does not necessarily follow from those judgments. It is also submitted that if reference to foreign law is acceptable for "unfamiliar" transactions it should equally be so for "familiar" transactions and that the proposed distinction is thus unacceptable in principle. 3. *Application of the proper law to the transaction.* This is derived from *The Colorado,* especially the judgment of Bankes L.J. but it is submitted that despite some ambiguity in the other judgments, they too can be interpreted as supporting this conclusion. It is conceded that it contradicts *The Milford* and *The Tagus.* But it is suggested that on principle this conclusion is the most acceptable. It is also suggested that if Scrutton and Bankes L.JJ.'s judgments are not thought actually to *support* this conclusion then the actual decision in *The Colorado* might be restricted to being authority that the proper law is to be applied to "unfamiliar" transactions and not to be authority for the negative proposition that the proper law is not to be applied to "familiar" transactions for that was not the issue in the case.

It is further suggested that *The Colorado* firstly supports the distinction between the creation of rights being governed by one law and the priority ranking system being governed by a possibly different law,[76] secondly, that it shows clearly the need to delimit the applicable foreign law where the issue of creation of rights is determined by application of the foreign proper law and, thirdly, that it shows the conceptual necessity of the fitting-in process when such rights are determined by the application of foreign law.

It is now proposed to discuss subsequent cases from various jurisdictions and thereby to amass support for one of more of the temporary conclusions just stated.

The Canadian Authorities

Three years after *The Colorado,* in 1926, the Supreme Court of Canada decided *The Strandhill.*[77] The case concerned the jurisdiction of the Canadian Court of Admiralty and not priorities, and judgment

[75] I.e. the problem posed.
[76] I.e. the *lex fori.* This is assumed throughout this article. *Supra,* note 14.
[77] *The "Strandhill"* v. *Walter W. Hodder Co., Inc.* [1926] 4 D.L.R. 801.

was expressly reserved on the issue of priorities, but one issue to be decided was whether the court should recognize and enforce rights that purported to derive from a contract which had American law as its proper law. Newcombe J., with whom four of the other judges concurred, delivered the majority[78] judgment of the Court. The court recognized and enforced the rights which derived from the application of the proper law to the transaction. These rights were fitted-in to the forum category of maritime liens. Newcombe J. said:[79] "It is clear, upon abundant authority, that a right acquired under the law of a foreign state will be recognised, and may be enforced, under the law of England, unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right." The enforcement of the right in this case was not contrary to domestic policy or procedure. Had that Canadian domestic law been applied to the transaction it would not have given a maritime lien. It is clear that neither the domestic rule nor the foreign rule concerning the creation of maritime liens were regarded by the Court as being "procedural". It will be suggested later[80] that the determination of the two classifications together by reference to the effect of their interrelation as is hinted at in this case may, in fact, be a better method of determination than the consideration of the forum and foreign rule separately. In any event this case clearly supports conclusion 3 because here the foreign proper law was applied to a necessaries contract, a "familiar" transaction.[81]

Another case in Canada which supports conclusion 3 and applied it to a case concerning priorities is *The Terry.*[82] This is an interesting and perhaps somewhat ignored decision.[83] The facts of the case closely resemble those of *The Tagus.* Had Canadian law, the *lex fori,* been applied to the transaction it would have given a maritime lien, but American law, the proper law, had it been applied would not. Sidney Smith D.J.A., refused to grant the claimant a maritime lien. The proper law was applied to determine the nature of the rights that resulted from the transaction and these rights were not equivalent to rights that in the forum constituted a maritime lien.

In *The Astoria*[84] (1931), however, Sir Douglas Hazen L.J.A., in the New Brunswick Admiralty Court, came to the strange conclusion[85] that although the existence of a foreign maritime lien created by the application of the proper law would be recognized in the forum, it could not be accorded the priority of a maritime lien created by the application of the *lex fori.* This is a short and somewhat muddled judgment and it was based on an article in the 1913 Harvard Law

78 Idington J. delivered a separate judgment but came to the same result.
79 *Supra,* note 77 at p. 806.
80 *Infra.*
81 To the same effect is *The Astoria* (1927). [1927] 4 D.L.R. 1022.
82 [19481 1 D.L.R. 728.
83 It does not appear to have been cited to either court in the *Halcyon Isle infra,* notes 25 & 35 and was not mentioned by the court in the *loannis Daskalelis supra,* note 53.
84 [1931] Ex. C.R. 195.
85 It is suggested that the judge in this case failed to apply the fitting-in process.

Review [86] written before *The Colorado.* Moreover *The Astoria* (1931) has been effectively overruled by the Canadian Supreme Court.[87]

The final Canadian case which we must consider is *The Ioannis Daskalelis.*[88] Todd's Shipyards had supplied necessary repairs to the vessel in America under an American contract. Had the *lex fori* been applied to the contract Todd's would not have acquired a maritime lien. Ritchie J., however held that:[89]

> "… *The Colorado* is authority for the contention that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English courts will recognize it and will accord it the priority which a right *of that nature* would be given under English procedure."

In his opinion *The Strandhill* also provided "ample authority"[90] for such a conclusion. Ritchie J.'s judgment, and the actual decision in the case which granted Todd's the priority of the holder of a maritime lien suggest that in Canada conclusion 3 is the preferred conclusion.

The Later English Authorities

In the English High Court in 1932 Langton J. decided *The Zigurds.*[91] The claimants had supplied burner coals to the vessel in Germany, and they claimed that under the contract they acquired the status of "ship's creditors" and that such creditors under German law possessed a "right to follow" their claim against subsequent owners and had priority over mortgagees. Langton J. rejected their claim to rank in England as holders of a maritime lien. It is submitted that this decision was not induced by an application of the *lex fori* to the transaction although it must be conceded that Langton J. did suggest that the court in *The Colorado* may have looked to the foreign proper law only because.. ."the instrument had only a parallel, and not an exact equivalent in English law… ,"[92] He also pointed out that in the instant case the court was faced with "… a class of creditor perfectly well known to English law,..."[93], that is, a necessaries man. However, finally, it is suggested, Langton J. based his decision on the nature of the right granted by German law as expounded by the German law expert whose evidence he specifically adopted as a correct statement of German law. According to German law, Langton J. found that, in fact, no "right to follow" resulted from the transaction and that therefore the rights created by the application of the proper law could not be fitted-in to the forum category of maritime liens. "This being the case…" he said,[94] "… there was no equivalence to a maritime lien." It is suggested [95] that, had there been such equivalence,

86 (1913) H.L.R. 358.
87 *Supra,* note 53 at p. 577. (The headnote is wrong where it says that *The Astoria* (1927) *supra,* note 81, was distinguished. It was *The Astoria* (1931). *Supra,* note 84.)
88 *Supra,* note 53.
89 *Ibid,* at p. 576. (His italics).
90 *Ibid,* at p. 578.
91 [1932] P. 113.
92 *Ibid,* at p. 124.
93 *Ibid.*
94 *Ibid,* at p. 125.
95 Cf. *Dicey and Morris, supra,* note 13 at p. 1113, who cite this case as supporting their conclusion. I.e. conclusion 2).

Langton J. would have recognized the claim to a maritime lien despite its deriving from a "familiar" transaction.

The Acrux[96] concerned the jurisdiction of the English Admiralty Court. The plaintiffs claimed, *inter alia,* that under Italian maritime law they had a right against the ship, a "… right *in rem* equivalent to a maritime lien,"[97] and that therefore the court had jurisdiction. The claim was for unpaid compulsory insurance contributions. Hewson J. analyzed the rights that were derived from the application of Italian law and found that: "So long as this privileged lien exists it is indistinguishable from a maritime lien."[98] However, the learned judge decided that reference to Italian law should not be to determine the rights that derived but only to ascertain the category of the claim. Once the category of claim was established he looked to the *lex fori* to determine whether a maritime lien had been created. As claims of this nature did not, under English law, give rise to a maritime lien, the claimant was denied a maritime lien. It must be concluded that this decision does not support conclusion 3. It is respectfully submitted, however, that Hewson J. misinterpreted *The Colorado.* He decided that under the authority of that case he had to "… look at the foreign law to see what kind of claim is being made, to identify it, and then to see if this court has jurisdiction and, if so what remedy to give."[99] In other words he felt that the foreign law determined only the type of transaction and not the rights that derived from the transaction. This interpretation of *The Colorado* stems, it is thought, from Atkin L.J.'s statement which was cited[1] by Hewson J. that "… in determining whether there exists a maritime lien the court will apply the *lex fori* and will give effect to the lien as it exists by English law."[2] It is again suggested that this statement may be taken as showing the role of the *lex fori* in the fitting-in process and the priority ranking of claimants and does not compel the conclusion that rights that may constitute a maritime lien are *created* by application of the *lex fori.*

Although *The Acrux* does not support conclusion 3 it equally provides no support for conclusion 2, for the necessity of reference to the foreign law, in the sense of *The Colorado* as interpreted by Hewson J., was not restricted to "unfamiliar" transactions. Indeed the nature of the transaction is, in this sense, what is determined by the reference to foreign law. It is suggested that the reasoning in *The Acrux,* if followed, would lead a court to refer to foreign law to ascertain the nature of the transaction upon which the claim is based and then to ascertain the creation of rights from that transaction by application of the *lex fori* to a transactions of that nature. It thus only provides support for conclusion 1.[3]

The Tervaete[4] and *The Tolten*[5] should also be considered since they have frequently been referred to in the cases with which we are

96 [1965] P. 391.
97 *Ibid,* at p. 398.
98 *Ibid.*
99 *Ibid,* at p. 404.
1 *Ibid.*
2 *Supra,* note 68 and see discussion in the accompanying text there of the possible implications of this statement.
3 See Webb (1965) 28 M.L.R. 591.
4 [1922] P. 259.
5 [1946] P. 135.

dealing although in neither case was the court concerned with the particular issue involved in these cases. Where these two cases have been referred to in order to ascertain the nature of the rights which constitute the domestic category of maritime lien such reference is perfectly acceptable as a necessary part of the fitting-in process.[6] However to refer to them for the purposes of the classification of maritime liens as substantive or procedural rights[7] is to ignore Cook's warning about the relativity of terms and to rely on "in-relief" precedent. In *The Tolten* itself Scott L.J. said[8] of *The Tervaete* (and *The Parlement Beige*):[9]

> "The only point decided in either of them was that sovereign ownership carries total immunity — not only from legal proceedings — but from the attachment of any lien to the property of the foreign sovereign. That rule of Public International Law relates in truth to the Jurisdiction not of the King's courts but of the king himself. It is territorial and not judicial".

This statement should certainly make any court wary of relying on *The Tervaete* for assistance in deciding difficult issues in other areas of the law.

The Tolten, as is well known, decided whether or not a claim could be entertained by the High Court of England, in the exercise of its Admiralty jurisdiction, for damage caused to foreign territory (immovables) by a vessel. The decision that the Court of Appeal reached was that the Mo9ambique rule[10] had no place in Admiralty actions.[11] There was no conflict between Nigerian law and English law as to whether a maritime lien had arisen. Scott L.J. asked himself:[12]

> "does the *substantive law* in Admiralty, that damage by a ship through its maritime fault *ipso facto* gives rise to a maritime lien in favour of the injured party,... enable, and indeed compel the Admiralty court to exercise its jurisdiction... without regard to the procedural bar?"

He gave an affirmative answer to the question. It is suggested that, as the issue decided by the court was of a markedly different kind to the issues faced in the cases we are dealing with, this "in-relief" precedent is of little value; however, it must be remarked that even if reference is made to *The Tolten* in this context it is clear that Scott L.J. contrasted "the procedural bar of the Mocambique rule" with the "substantive law in Admiralty that damage by a ship through its maritime fault *ipso facto* gives rise to a maritime lien." It follows that this English rule of law, in this context, was not regarded as a matter appertaining to procedure.

One further point should perhaps be made about *The Tolten.* It has been suggested[13] that Scott L.J.'s approval in that case of the following passage in Dicey:[14] "it may be laid down that the court

6 See e.g. *The Colorado, supra,* note 62.
7 See e.g. *The Halcyon Isle, infra,* notes 29 & 30.
8 *Supra,* note 5 at pp. 160 and 161.
9 (1880) 5 P.D. 197.
10 The rule derived from *British South Africa Co.* v. *Companthia de Mocambique* [1893] A.C. 602.
11 The discussion here is designed only to cast light on the problems we are discussing in this article.
12 *Supra,* note 5 at p. 143. My italics.
13 E.g. by Hewson J. in *The Acrux, supra,* note 95 at p. 402.
14 Dicey, *The Conflict of Laws* (1932 5th Ed.), p. 25.

has jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists," implies that Scott L.J. felt that the *lex fori* should be applied to the transaction to determine the creation of a maritime lien. In approving the passage Scott L.J. said:[15] "He[16] was far too careful and prudent a writer to omit any relevant qualification when enunciating an absolutely general principle of law such as the above paragraph". It is clear in the context that "any relevant qualification" refers to a possible qualification in relation to the jurisdiction of the court where the maritime lien arises from damage to foreign immovables and not to the issue of choice of law. In any case conclusion 3 would support the determination of the existence of a maritime lien by English law, but only in that *lex fori* must be used in the "fitting in" process. It is suggested that these passages provide no assistance to the resolution of the problem posed. It would appear that, while the position in England is not as clear as in Canada, *The Colorado* and *The Zigurds* suggest that conclusion 3 is to be preferred to conclusion 2. *The Acrux* which provides support for conclusion 1 is out of line with those two cases and is thus, it is thought, wrong.

The Christine Isle from Bermuda

In 1974, in the Supreme Court of Bermuda, Seaton J. decided *The Christine Isle.*[17] The case concerned the claim of an American necessaries man, who had supplied necessaries to the ship in American ports under contracts with American proper laws, to rank in Bermuda in the category of a holder of a maritime lien. In Bermuda the *lex fori,* had it applied to the transaction, would not have given a maritime lien. American law, the proper law, would have given rights which amounted to a maritime lien. Seaton J. refused to grant the claimant a maritime lien. In the course of his judgment he analysed many of the cases that I have already mentioned but space does not permit detailed comments upon his analysis: it must however be emphasized that his conclusion that the nature of a maritime lien is as a "remedial mechanism"[18] was to some extent reached by reliance upon "in-relief" precedent such as *The Tervaete.* Seaton J. however said that *The Colorado* decided that: "French law determined the substance or nature of the claimants right while English law determined the nature of the remedy which enforces the right, and specifically whether a right of that nature ranked before or after an opposing claim,"[19] and that in *The Zigurds:* "The evidence did not show that there was any maritime lien ... according to German law .... Once they had been definitely assigned to an ascertained class of creditor, it followed that the ranking of their claim must be determined by English law as being the *lex fori."*[20] But these cases suggested to him only that foreign law should be referred to, to ascertain "the class of creditor" and that in the present case as the claimant was clearly a necessaries man, he should be accorded the rank of a Bermudan necessaries man. *The loannis Daskalelis* differed from his views, he said, "in that Ritchie J.

15 *Supra,* note 5 at p. 161.
16 Dicey (my note).
17 1974 A.M.C. 331.
18 *Ibid,* at p. 338.
19 *Ibid,* at p. 335.
20 *Ibid,* at p. 336.

would apparently determine the nature of the American claimant's remedy according to the law of the United States."[21] Seaton J. did not, presumably, mean that Ritchie J. adopted the proper law's priority system for it is quite clear that in that case the *lex fort's* system was adopted.[22]

We must conclude that *The Christine Isle* does not support conclusion 3, despite the learned Judge's opinions[23] and adoption of the ratios of *The Colorado* and *The Zigurds* because the decision in the case prohibits such an inference. It may be that the learned Judge would accept conclusion 2 because he appears to have accepted that "the class of creditor" may be determined by reference to foreign law. Although here again his explanation of *The Zigutds,* where the claimants were clearly "necessaries men", implies that in that case it was important that German law did not show that there were rights which would amount to a maritime lien, a fact which would be quite irrelevant in conclusion 2. It is suggested that Seaton J.'s decision that maritime liens are a matter appertaining to procedure must be taken as support for conclusion 1, and that his conclusion as to the effect of *The Colorado* must have been the same as that of Hewson J. in *The Acrux.*[24] Although the decision in *The Christine Isle* casts doubts on the validity of conclusions 2 and 3 it is suggested that the interpretation put on *The Colorado* was wrong and that the reasoning of the judgment, in its use of "in-relief" precedent and its failure to distinguish the processes involved in the recognition of a maritime lien from the process of ranking such liens, is somewhat suspect.

The Halcyon Isle from Singapore

A markedly similar judgment and the same conclusion on essentially similar facts was delivered by the trial judge, Kulasekaram J., in 1977 in the Singapore High Court in *The Halcyon Isle.*[25] The claimants were again, as in *The loannis Daskalelis,* Todd's Shipyards. Kulasekaram J. decided that: "… [T]he main question that has to be answered is whether a maritime lien is on the one hand a substantive right of Todd's contract or on the other hand a remedial or procedural right."[26]

The resolution of this question was approached by analyzing a series of cases[27] from English Admiralty law on the nature of maritime liens generally which led to the temporary conclusion that:[28]

> "A right which originated as a remedy would appear now with this engrafted attribute to have been elevated to a substantive right under a contract. In my opinion in reality this is not so and a maritime lien remains essentially as a remedy though it appears to have some attributes of a substantive right."

21 *Ibid,* at p. 342.
22 See *supra,* note 53 at pp. 578 & 579.
23 *Supra,* notes 19 & 20.
24 *Supra,* p.
25 [1977] 1 M.L.J. 145.
26 *Ibid,* at p. 146.
27 E.g. *The Dictator* [1892] P. 304, and *The Bold Buccleugh* (1851) 7 Moo. P.C. 267.
28 *Supra,* note 25 at p. 147.

It is apparent that the classification was an extremely difficult one to make. So Kulasekaram J. went on to consider in detail all three judgments in the Court of Appeal in *The Tervaete.* He took these judgments to "indicate that it is essentially a remedial right".[29] The passages he cited from *The Tervaete* showed "… the procedural character of this right."[30] Yet in doubtful cases of classification into substance and procedure it is questionable how far "in-relief" precedent of this nature can be of assistance and indeed it may be positively dangerous because, by ignoring the relativity of terms, the judge might assume that there is a single *answer* to the classification in all cases and this can obscure the particular purpose involved in the classification in the case at hand. Turning then to cases decided on the problem posed, Kulasekaram J. concluded that in *The Colorado:* "French law was admitted to understand the nature of the French mortgagee's claim under a 'Hypotheque' which was unknown to English law and what rights such a 'Hypotheque' conferred on the holder"[31] but that with the exception of Scrutton L.J. the court in that case did not find that a maritime lien existed and that therefore the case was not authority for holding that a maritime lien was a "substantive" right even in the narrow sense of conclusion 2.[32] He was not swayed from this conclusion by the Canadian cases which he either distinguished[33] totally or regarded as decided on "very peculiar facts".[34] His judgment thus supports only conclusion 1. Again the use of "in-relief" precedent and the failure to classify with a clear purpose in mind detracts, it is suggested, from the value of the judgment but it does provide a clear example of the dangers of approaching the problem in such a way. The decision was reversed by the Singapore Court of Appeal[35] in December 1977. In the Court of Appeal the mortgagees contended that:[36]

> "[F]oreign law will be admitted only when the nature of the claim asserted is not known to the court in order to enable the court to identify the nature of the claim to decide whether or not to accept jurisdiction, what remedy is appropriate and how to fit the claim into the order of priorities."

They were clearly proposing that the Court adopt conclusion 2, The Court first analyzed the nature of an English maritime lien by reference to *The Tolten* and *The Tervaete.* It has already been suggested that this is a dangerous approach to the classification although it is clearly essential for the fitting-in process. However, the Court concluded as a result of its analysis that "… a maritime lien is in its nature a substantive right...."[37] Whilst in the event this conclusion leads, it is thought, to the preferred result it is nonetheless submitted that "in-relief" precedent should not compel a conclusion either way and that it is only in the light of the purposes of the classification and the conflict of laws generally that such a classification should be approached. It may be that such objectives were in the mind of the

29 *Ibid.*
30 *Ibid,* at p. 148.
31 *Ibid,* at p. 149.
32 *Ibid.*
33 *The Strandhill, supra,* note 77; *The Astoria* (1927) *supra,* note 81.
34 *The loannis Daskalelis, supra,* note 53.
35 [1978] 1 M.L.J. 189.
36 *Ibid,* at p. 190.
37 *Ibid,* at p. 191.

court and indeed might account for their conclusion differing from that of the trial judge. They said:[38] "Apart from authority, we are of the opinion that *in principle* the courts of this country ought to recognize the substantive right acquired under foreign law...."

The Court supported the interpretation[39] put on *The Colorado* by the Supreme Court of Canada in *The loannis Daskalelis.* This agreement was thought to be desirable, generally, "... to preserve uniformity with the law of England on these matters."[40] It is interesting that the objective of international uniformity was regarded by the court as of importance. It has been suggested that that objective might lead not only to a respect of a foreign decision as of "the highest persuasive authority"[41] but should also influence the actual classification process in the present type of case.

The Court granted the American necessaries man a maritime lien. It was found by applying the foreign proper law to the transaction to ascertain the rights created and, as these were identical to those of the Singapore category maritime liens, Todd's were then ranked in the category of holders of a maritime lien in the forum's priority system. The Court, it is true, paid no attention to the delimitation of the foreign rights or to the fitting-in process although these are both conceptually necessary. Like *The loannis Daskalelis, The Halcyon Isle* in the Singapore Court of Appeal is clear authority for conclusion 3 and explicitly rejects conclusions 1 and 2.

It is suggested that conclusion 3 commands the support of *The Colorado* and most of the subsequent cases, especially *The Halcyon Isle* and *The loannis Daskalelis,* and that conclusion 3 is also the preferred conclusion in principle. It will now be suggested that the traditional approach to the problem posed has been responsible for much of the confusion and doubt that, as we have seen, has plagued this area of the law and that a different approach, which will be outlined, would have clarified the issues involved.

THE PROPOSED APPROACH

It has already been suggested that in the traditional approach two classifications into substance and procedure may be conceptually required. If the initial classification of the forum rule leads to the conclusion that maritime liens are substantive rights then delimitation of the rights derived from applying the foreign law will also be necessary. Much has been written about how classification should be undertaken by the courts but, with a few exceptions, the courts have not made explicit, in particular cases, their approach to the question. In most of the maritime lien cases it has been tacitly assumed that once the forum right has been classified as substantive the foreign right will also be substantive, and therefore the classification of the foreign rule has been largely ignored. It is thought that the isolated analysis of the forum rule in this context has lead courts, in some cases, to forget the purposes of the classification and the conflict of laws generally and that this is evidenced, to some extent, by the fairly extensive use of "in-relief precedent".

38 *Ibid,* at p. 191. (My italics).
39 See *supra,* note 89.
40 *Supra,* note 35 at p. 191.
41 *Ibid.*

It is here suggested that rather than attempting to develop the classification processes within the traditional approach the courts might abandon that approach which attempts to classify the forum rule and the foreign rule in isolation from one another and adopt an approach which attempts to classify the forum and the foreign rule by reference to their functional interrelation. It is thought that such an approach will be more likely to further the purposes of the classification and the conflict of laws generally. The suggested approach accepts that there can be tension between the rule that procedural matters are governed by the *lex fori* and the rule that substantive rights are created by application of the proper law and it seeks to make evident that tension where it exists but equally to make clear when no such tension exists. This tension may arise because the "procedure" rule tends to negate the purposes of consistency and uniformity that are reflected in the "substantive" rule. The procedural rule is however just as necessary as the substantive rule because to refer all issues in a case to the proper law would be too "inconvenient" to be workable.

The classification into substance and procedure is therefore best approached, in this area, by ascertaining, in what forum that can "conveniently" be done, the rights that derive from applying the proper law to the transaction and then by deciding whether it would in fact be "inconvenient" to recognize and enforce those rights in the forum. It is suggested that if "inconvenience" is indeed the purpose, in this context, of applying the *lex fori* to certain issues, then the best way of deciding whether it would be "inconvenient" to apply foreign law and recognize and enforce the resulting rights, is to see whether it is practically "inconvenient" to do so. If it is not, then those rights should be enforced but if it is then the *lex fori* must be applied to the issue. It is submitted that, where a claimant asks the court to recognize and enforce a maritime lien, this approach makes explicit the tensions involved in the particular classification and therefore makes it easier for the court to reach a conclusion which so far as is possible represents the general purpose of the conflict of laws without ignoring the practical necessity of some *lex fori* control.

It must be stressed that the utility of the proposed approach has been derived from a study of the cases discussed on maritime liens and that it is not, therefore, necessarily capable of extension to all instances where a classification into substance and procedure is required. It is peculiary appropriate where a court is deciding a claim by a party to be placed in a particular forum category, either for the purposes of jurisdiction or priorities, because in such cases the relevant rules of the *lex fori* and the proper law are clearly defined. Thus, if it is convenient to ascertain the rights that derive from an application of the proper law to the transaction and convenient to recognize and enforce those rights in the forum, the court should do so because it will thereby fulfil the purposes of the conflict of laws as a whole. On the other hand, if it is inconvenient the *lex fori* must be applied to the transaction and the claimant will be entitled only to such rights as derive from that application.

It is suggested that where a court is faced with a problem of the kind that has been discussed in this article it will generally be apparent that it is not "inconvenient" to ascertain the rights that derive from applying the foreign proper law and that, equally, when such rights are the same as or equivalent to the rights that constitute the forum

category maritime lien it is not inconvenient to fit them in to that forum category and thus enforce them. It has already been suggested that the weight of authority at the present time favours such a result in any case but it is hoped that the approach here formulated will provide a tool which shows clearly the reasons for such a result. It is also hoped that the approach will emphasize why conclusion 2 which is espoused by Dicey and Morris[42] is unacceptable in principle. The distinction between "familiar" and "unfamiliar" transactions will be seen, if this approach is adopted, to be irrelevant to the decision.

It is, of course, not suggested that this approach leads necessarily to a particular result. It is conceived of as a method of approaching a problem. Clear provisions in statutes, public policy and other factors may in some cases prevent the result suggested by the approach. Equally it is not suggested that the approach, or even the result suggested for maritime liens, will always lead to uniformity. The forum's categories, public policy, different methods of ascertaining the proper law and, above all, the forum priorities system may all prevent uniformity in particular cases, but that does not mean that an approach or a result which tends to produce uniformity is not desirable. If, in fact, uniformity is not to be achieved in a particular case it is preferable that the actual grounds for such a failure be made explicit. If, for example, the forum's priority system differs from that of the proper law, then this difference should be analysed and the adoption of one or other system justified. If a foreign maritime lien is to be refused recognition on grounds of public policy those grounds should be articulated. Only in this way can a consistent system for the resolution of conflict of laws cases be developed within our jurisdiction-selecting system.

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[42] *Supra,* note 60.

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