ADDRESS TO MARITIME LAW ASSOCIATION:

Lord Stowell - address to AGM of Maritime Law Association of Australia and New Zealand Queensland Branch - November 1998.

An after dinner speaker has a choice. He can attempt to amuse or to instruct. As amusement, like all pleasure, is momentary but knowledge sometimes lingers on I thought I should opt for instruction.

The practise of Maritime Law has in common with the practise of any other kind of law that it is usually dull. Only those with a slight knowledge of the topic harbour any illusion about its romantic character. For the most part the practise of Maritime Law is involved with grimy prawn trawlers that sink unexpectedly when fully insured or which collide with each other because their crew did not go to school long enough to learn how to count or to read the instructions for the sophisticated navigational aides with which they are equipped.

When thinking about what I might say I wondered if it were always so, or whether there might not have been a golden age when admiralty practice did involve moments of drama or excitement. While looking idly for a topic I discovered the life of an early judge whose work laid the foundations of admiralty jurisdiction and who expressed principles in his judgments which are still referred to. As well his times provided interesting cases. Would any modern judge have occasion to say in a judgment:

> "There is said to be a fashion in crimes, and piracy, at least in its simple and original form, is no longer in vogue. Time was, when the spirit of buccaneering approached, in some degree, to the spirit of chivalry in point of adventure; and the practise of it was thought to reflect no disgrace on the distinguished Englishman who engaged in it."

I had not known anything of the judge and believing myself to be no more than usually ignorant I surmised that many of you would not know of him either. To say something of his life and work seemed therefore appropriate on two counts. As I said earlier, all knowledge is potentially useful and the judge's contribution to maritime law ought to be accorded at least a glimmer of recognition as generations pass.

Although I have chosen to inform rather than amuse you I would not have you think that biography is necessarily humourless. While researching something else not long ago I came across a black vignette in the life of Sir Hayden Starke who sat on the High Court from 1920 -

1950. The judges of the court attended Sir Isaac Isaac's funeral on the hottest day recorded in Melbourne. The ceremony was held around an open grave. As his former colleagues filed passed the grave Starke lent forward to the very ancient Rich J and asked him "George, are you sure its worth your while to go home?"

The judge whose life and times I hope will hold your interest is Baron Stowell who was judge of admiralty for thirty years from 1798 - 1828. His tenure therefore spanned the whole of the Napoleonic wars.

Before he became Baron Stowell in 1821, he had been William, and then Sir William Scott. He had a younger brother, John, who also had a distinguished career as a judge. John Scott was also given a peerage and he is well known to us by his title. He was Lord Eldon.

The compilers of biographical dictionaries assert that William Scott was one of England's greatest judges. Holdsworth wrote of him that he stood equal in stature with Sir Matthew Hale and Lord Mansfield and that "what Hardwicke and Eldon did for equity and what Mansfield did for the common law, Stowell did for all those branches of law which fell within the sphere of the civilian's practice", that is the laws of admiralty and matrimony.

Let me give you a brief biographical sketch.

William Scott was born in 1745 and died in 1836. Fortune seemed to smile upon him from his very beginning. His parents lived in Newcastle in Yorkshire where his father was a coal fitter, that is someone who bought and sold coal and arranged for its transport by ship. You might recall that Cook's Endeavour was a Newcastle collier before being fitted out for exploration.

1745 was the year of the Jacobite Rebellion when Bonnie Prince Charlie claimed to be rightful king. His armies threatened Newcastle when Mrs Scott was about to give birth to William. Fearing for her safety should the rebels capture the town Mr Scott sent his pregnant wife south across the River Tyne to the comparative safety of Durham. She had to be lowered down the city walls into a waiting boat. This accident of birth which saw him born at Durham not in Yorkshire made William eligible for a scholarship to Oxford University. Had he not been born in Durham it is unlikely he would have gone to Oxford.

He was a brilliant student and became reader in ancient history whose lectures earned the grudging admiration of Gibbon.

Scott had met Dr Johnson at Oxford and become one of his circle. They remained friendly

until Johnson's death. It was Stowell who supplied Johnson with a definition for his celebrated dictionary. Johnson described "taste" in Stowell's words -

> "that faculty of the mind which leads a Scotsman to prefer England to his own country".

Scott became intimate with such notables as Joshua Reynolds, Edmund Burke, and of course, James Boswell.

Scott was a convivial and likeable man, a bon vivant who enjoyed company, conversation and excessive eating and drinking. Boswell described him as a "two bottle man". Despite being wealthy (he inherited a large fortune from his father and made a very much larger one himself) he was quite mean. It appears to have been the only flaw in his character.

His first wife died and he married a second time in bizarre circumstances. Scott presided at a trial in the Old Bailey at which a young Lord Sligo was charged with inducing two seamen to desert a British warship to join the crew of Sligo's yacht. He was convicted and Scott sent the young man to jail. His mother, a widow, had observed the trial and was much impressed by the judge. She arranged to meet him and they married not long afterwards.

His father's business had prospered and when he died in 1776, Scott succeeded to an independent income with which he thought he might try his hand as a barrister. He had had some practical experience in shipping. He helped run the family business after his father died. One of his brothers was a privateer. In 1779 he became a fellow of Doctors' Commons which was the small enclave of barristers trained in civil or Roman law rather than common law. He quickly achieved enormous success though he was for a time a nervous and hesitant speaker. He would write out in full his argument and read from his manuscript. His ability, coupled with his knowledge of history and civil law gained from his university teaching were soon apparent. His practical experience of shipping gave him a shrewd insight into the problems he was later to solve as a judge. He was showered with briefs and appointments. In 1782 he was made Advocate General for the office of Lord High Admiral. In that capacity he was entitled to a fee for every case heard in the court concerning ships taken as prizes of war and as Britain was constantly at war with someone during those years the post was lucrative.

His wealth was considerable. When he died his personal estate amounted to almost a quarter of a million pounds. I suppose to express that in today's values you would multiply it by at least twenty or thirty. As well he left real estate bringing in an income of £12,000.00 a year.

The two brothers, Lords Stowell and Eldon, grew up in times of revolution and unrest. Their family background was one of prosperity earned from commerce. The combination appears to have left its mark on both. They were staunchly conservative and vigorously opposed reform in any guise.

Lord Stowell's abilities were given ample scope for display. Before his appointment no reports of the decisions of the court had been published. There were some fragmentary notes of earlier judgments but no reasoned precedents or established principles. He was free to express his own opinions. He occupied the enviable position of being able, as a judge, to make law not merely to apply it. In so doing he laid down principles both of maritime and international law that have been applied without question for generations and are still accepted as current today or are referred to for an understanding of how the law has developed.

Stowell actively promoted the reporting of his judgments, no doubt partly from vanity, but also to ensure the recording of his judgments for the guidance of future cases. He encouraged Robertson, Edwards, Dodson and Haggard to report his judgments and edited their drafts.

The time he occupied as admiralty judge were momentous in world history and events gave him immense opportunity to express his learning and to systematise the principles of applicable law. He seems to have been conscious of the opportunity and of his own capacity to put it to good use.

There were two aspects to the work of the Admiralty Court. The first was called its Instance jurisdiction which involved ordinary civil disputes between private litigants. Claims for salvage, or wages, or damages for collision were determined in this jurisdiction. It was so called because suits were brought at the instance of a party.

The second part was called the Prize jurisdiction. This was the aspect that laid the foundation for Stowell's later fame. Its name comes, of course, from the fact that ships captured during hostilities, whether merchant or warships were known as "prizes". Every captured prize had to be the subject of adjudication by the Court of Admiralty. Prizes and their cargoes, if condemned by the decree of the Court, were sold and the proceeds divided in varying proportions between the captors and the Crown. But the arrest of shipping was not meant to be out-and-out piracy. Not all seizures were lawful and it was the role of the admiralty judge to determine whether the prizes should be returned to their owners or condemned and sold.

Part of British strategy in the wars against Napoleon was to impose a naval blockade

against continental Europe to hamper the French war effort. Any merchant ship found trying to evade the blockade by leaving or entering a French port was subject to search and seizure. French shipping was, of course, a legitimate target. But neutral countries could continue to trade with impunity as long as their cargoes were not what was described as "contraband of war" which were materials that might be used to assist in the prosecution of the war. What ships could be seized and in what circumstances and what cargoes might be confiscated and which were immune were problems which confronted the court on a daily basis. The legal rules to determine these questions were, when Stowell took office, both vague and elusive. It was Stowell's lasting contribution to maritime jurisprudence that he developed a clear set of legal principles which established rules of international law by which the lawfulness of government and government authorised actions in seizing ships and cargo belonging to foreign nationals could be determined. The principles he applied lasted until the Second World War and some of the legal concepts he developed in international law are still referred to with approval.

Scott was well suited for the work. He had an academic mind capable of surveying and explaining the facts of a complex case and the legal principles applicable to those facts. Combined with his deep knowledge of history and powers of analysis he had powers of expression which enabled him to turn his judgments into literature. He had, as a contemporary said, a clear logical mind which enabled him to grasp rapidly the essential issues in any case and to come to the right conclusion upon the facts. Many judges have had this ability. Some still do. Lord Stowell's genius lay in his ability to state and explain the principles which were applied. He was very learned and had read very widely. He had an understanding of the technical rules of the civil law and of the English common law. His knowledge and grasp of history enabled him to appreciate the manner in which rules of law had developed in the past and how they should be applied in the present. As well he had the gift of felicity of expression. He took great care with his writing.

Many neutral countries, particularly the United States, felt aggrieved at the workings of the Court of Admiralty in England. A cynic would say that the overwhelming majority of its decisions favoured the English captures over the protests of the foreign ship and cargo owners. But he said of the prize jurisdiction of his court that he sat,

> "Not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some

happening to be neutral and some to be belligerent."

When the passions of the war had abated Mr Justice Storey, the well known American judge and text writer in equity, wrote to Stowell to acknowledge that though he had criticised his judgments during the wars, on calm reflection he had come to agree with them. He went on to say that he intended to make sure Stowell's decisions formed the basis of the maritime law of the United States.

Among the principles which Lord Stowell pronounced and to which he gave certainty was the illegality of trading with an enemy during war. He decided *The Hoop* in 1799. The High Court adopted the principle in two cases decided after the First World War, *King v. Snow* (23 CLR 256) and *Moss and Phillips and Donohoe* (20 CLR 580).

Lord Stowell also devised the rules for determining what was the trade domicile in war for the purpose of establishing whether a merchant had the character of neutral or belligerent.

He developed the doctrine of continuous voyage. The United States was neutral in the Napoleonic wars. Its ship owners, then as now, looked to make a dollar at every opportunity and its diplomats sought to make mischief. There was, as part of the blockade, a prohibition against carrying merchandise from French colonies to continental Europe. American ships sought to evade the blockade by consigning goods from the West Indian colonies to some neutral port in the United States and then trans-shipping them on another vessel which brought them to Europe ostensibly as American cargo. In *The Maria* he had regard to the reality rather than the fiction and held that if cargo were in fact destined for enemy territory or came from an enemy colony it was confiscated whether it was nominally consigned to or had nominally been trans-shipped from a neutral port. He said:

> "The truth may not always be discernable, but when it is discovered, it is according to the truth and not according to the fiction that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended."

Windeyer J cited this passage in *Western Interstate Pty Ltd v. Madsen* (107 CLR 102) a case concerning section 92 of the Constitution in the days when states imposed restrictions on road transport and carriers sought to evade the restrictions by routing their trucks to cross a state border. Thus a carriage from Brisbane to Kingaroy would go via Tenterfield. Windeyer J noted:

> "Early English nineteenth century law concerning contraband of war and Australian constitutional law of interstate trade today may seem to be topics far remote from one another. Nevertheless, the judgments of Lord Stowell ... are well worth consideration by those who suppose that questions such as arise in this case depend upon purely geographical facts or upon a mere going across a state border and performing some ceremonies there."

Shipowners are notorious for trying to save money at someone else's expense. The doctrine of entire contract had its origin in the desire of shipowners to save wages by not paying the widow and children of a seaman who had died on the voyage though he may have performed arduous and dangerous duties for a considerable part of it. If he did not survive the entire journey he was paid nothing. One ingenious shipowner sought to avoid paying wages to a seaman who turned out to be a woman. The shipowner was no doubt outraged that the rest of his crew should have been exposed not only to the perils of the sea but to the moral hazard posed by her presence. He refused to pay her wages but she succeeded in a suit to recover them. Lord Stowell said:

> "the work has been done, and well done: it is too late to object surely to the payment of the wages on the ground of the sex of the person employed in performing them. The witnesses speak to exhibitions both of skill and strength in her serving her due time at the helm, and in lending her hands, which were sufficiently robust, at the pulling of ropes upon deck. There is no limit to the achievements of women."

Can I turn to some particular instances where Lord Stowell's judgments are still utilised today.

The definition of salvage found in *Halsbury's Laws of Australia* is taken verbatim from Lord Stowell's judgment in the *Neptune* decided in 1824. The paragraphs which describe the circumstances in which salvage can be claimed and the principles by which the amount of the reward is calculated also come from Stowell's judgments.

Stowell's sense of humour can be seen in a judgment he wrote in which an ambitious claim for salvage services had been made. He wrote,

> "Much lamentation has been indulged in on the small reward that Captain Thompson will receive for this adventure. The court may entertain a wish that this polacre had been a galleon for the benefit of these British officers; but it has not

> the power of converting a polacre into a galleon. I do not doubt that Captain Thompson is a man fitted for great and daring enterprises; but this is not an adventure of that class. Here is no room for extraordinary daring or extraordinary skill and management. The only danger to be contended with is that of the wind blowing fresh and the waves running high, and this to be encountered in a proper boat, and manned in an able manner, and at the distance of a musket shot from the shore. It appears therefore to me that it needs a strong magnifying glass to see in this action anything that might not have been done by a set of young men who are members of any of the boat clubs on the Thames."

Halsbury's Laws of Australia are also indebted to Lord Stowell for its treatise on the topic of damages done by collision between ships and for the entitlement of seamen to their wages. In 1963 the High Court had reference to one of Lord Stowell's aphorisms to decide such a question. Stowell had said "supposing informality in the mode of hiring, still if the work is being done and properly done it entitles the performer to the common remuneration".

Earlier this year the Federal Court had regard to Lord Stowell's judgments to determine the liability of a marshall put on board an arrested ship.

In cases heard by the High Court in the years following both the First and Second World Wars involving contested claims to property damaged or seized during hostilities, the court had regard to the principles set out by Lord Stowell a century before during a different global conflict.

Let me give the last word to Viscount Sanky, a Lord Chancellor, who addressed Stowell's old college to mark the centennial anniversary of his death. He concluded in true oxonian style "Lord Stowell did a good day's work for England, and, after all, that is what really matters".