Harmer v Bell

The Bold Buccleugh

(1852) 7 Moo PC 267, 13 ER 884

PRIVY COUNCIL
Sir Frederick Pollock, Sir John Jervis, T. Pemberton Leigh and Sir Edward Ryan

1850 – DECEMBER 16
1851 – MAY 16, DECEMBER 10
1852 – APRIL 24

Damage creates a lien on the ship causing the collision.

A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the Court of Admiralty in England, by the owners of the English vessel, against the owners of the steamer, and a warrant of arrest issued against the ship; but, before the ship could be arrested, she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer, in the Court of Session in Scotland, for the damage, and the steamer was arrested under process of that Court, but subsequently released upon bail. Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the Court of Session were still pending, when the steamer having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that Court, for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the Court of Session. The owner of the steamer appeared under protest in the Admiralty Court, and pleaded, first, *lis alibi pendens;* and, secondly, that he was a purchaser for value without notice.

– Held by the Judicial Committee, overruling such protest,

First, that the plea of *lis alibi pendens* was bad, as the suit in Scotland was, in the first instance, *in personam,* the proceedings being commenced by process against the persons of the owners of the vessel, (the Defendants,) and the arrest of the steamer only collateral to secure the debt, while the proceedings in the Admiralty Court in England were, in the first instance, *in rem,* against the vessel, and, therefore, the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other.

Secondly, that as, by the Civil law, a maritime lien does not include or require possession, but being the foundation of proceedings *in rem* (a process requisite only to perfect a right inchoate from the moment the lien attaches), such lien travels with the thing into whosesoever possession it may come, and when carried into effect by a proceeding *in rem,* relates back to the period when it first attached; the steamer was liable for the damage committed by her, though in the hands of a purchaser without notice of the damage, or the proceedings instituted against her.

Semble: Such lien arising out of damage is not indelible, but may be lost by negligence or delay, where the right of third parties are compromised.

Distinction between proceedings *in rem,* in the Admiralty Court in England and Foreign attachment in the City of London.

(i) maritime lien – see *The Mary Ann* (1865) LR 1 A & E 11; *The Halley* (1867) LR 2 A & E 21; *The Peronia* (1868) 2 A & E 72; *The Charles Amelia* (1868) 2 A & E 333; *The Two Ellens* (1871) LR 3 A & E 357; *The Parlement Belge* (1880) 5 PD 219; *The City of Mecca* (1881) 6 PD 106; *Stoomvaart Maatschappij Nederland v P. & O. Steam Navigation Co* (1882) 7 App Cas 817; *The Heinrich Björn* (1885) 10 PD 54, (1886) 11 App Cas 284; *The Tasmania* (1888) 13 PD 115; *Currie v McKnight* [1897] AC 97;
(ii) *lis alibi pendens* – see: *The Mali Ivo* (1869) LR 2 A & E 359.

APPEAL FROM THE HIGH COURT OF ADMIRALTY

DANIEL HARMER, the Appellant;
WILLIAM ERRINGTON BELL and Others, Respondents.

This appeal originated in a cause of damage, civil and maritime, promoted by the Respondents, the own- **[268]** ers of the barque *William,* against the steam-ship, the *Bold Buccleugh.,* by reason of a collision between these vessels.

The *Bold Buccleugh* belonged to the Edinburgh and Dundee Steam Packet Company, trading between Leith and Kingston-upon-Hull, in Yorkshire, the partners of which Company were all resident in Scotland. The collision took place in the river Humber, on the 14th of December, 1848, when the barque *William* was run down by the *Bold Buccleugh,* and totally lost.

On the 19th of the same month, an action for damage was entered in the High Court of Admiralty in England, on behalf of the Respondents (who were domiciled and resided in England), the owners of the barque *William,,*against the *Bold Buccleugh* and the partners of the Edinburgh and Dundee Steam Company, and a warrant of arrest was extracted and forwarded to Hull to be executed; but the *Bold Buccleugh* had left that port for Leith, before the arrival of the warrant, and consequently could not be arrested. **[269]** The owners of the *William* then applied to the owners of the *Bold Buccleugh* to give bail to the action, which they declined to do, and the*Bold Buccleugh,* still continuing out of the jurisdiction of the Admiralty Court, and within the jurisdiction of the Scotch Courts, the owners of the *William,* on the 30th of January, 1849, commenced a suit against the owners of the *Bold Buccleugh,,* in the Court of Session in Scotland, and the steamer was forthwith arrested in Leith harbour; but on bail being given to answer the action in that Court, she was released. By a bill of sale, dated the 26th of June; 1849, the owners of the *Bold Buccleugh* sold her absolutely to the Appellant for £4800, without notice to him of any unsatisfied claim arising out of the damage done to the *William,* or any suit pending in regard thereto, in the Court of Session, in Scotland; but in August following, the vessel having returned to Hull, was again

arrested by virtue of a warrant, under seal of the High Court of Admiralty, and a fresh action commenced in that Court, instructions being sent to Scotland for the immediate abandonment of the suit in the Court of Session. An appearance under protest was entered by the Appellant, and an Act on Petition brought in on his behalf, disclaiming the jurisdiction of the Court of Admiralty to entertain the second suit.

The Act alleged, that on the 30th of January, 1849, a suit was commenced in the Court of Session in Scotland, on behalf of the owners of the *William,* against the Edinburgh and Dundee Steam Navigation Company, the then owners of the *Bold Buccleugh,* in order to obtain compensation for the loss sustained by them in respect of the barque having been run **[270]** down by the *Bold Buccleugh,* and totally lost. That in pursuance of the writ of summons issued in the said suit, the *Bold Buccleugh* was arrested, but bail having been given on behalf of the owners, she was released. That this suit and also another suit instituted in the same Court, on behalf of the owners of the cargo laden on board the *William,* against the then owners of the *Bold Buccleugh,* was still pending in the Court of Session in Scotland, and expected to come on for hearing in that Court, in the month of December then next. That the cause of action in the present suit was the same as in the suit then depending in the Court of Session in Scotland. That on the 26th of June, 1849, the then owners of the *Bold Buccleugh,* for a valuable consideration, absolutely sold and conveyed the steamship to Daniel Harmer, her present owner.

The answer of the owners of the *William,* after setting forth the fact of the running down of the barque, alleged, that an action was brought by them in the Court of Admiralty, against the steamship, in respect of the loss they had sustained, and a warrant, under the seal of the Court, extracted and forwarded to Hull, for the purpose of being there executed upon the steam-ship, which had quitted the port before the arrival of such warrant, and that (whether by accident or design) the *Bold Buccleugh* never came within the jurisdiction of the Court of Admiralty, so that she could not be arrested by authority of that Court, and the owners of the *Bold Buccleugh,*when applied to, refused to appear and give bail to the action so entered against them. That a suit was commenced in the Court of Session in Scotland, by the owners of the *William,* and for a time was prosecuted, but that such suit was not still pending, or at least then **[271]** being proceeded with there as alleged; on the contrary, that the *Bold Buccleugh* having, in the month of August then last, arrived in the port of Hull, the owners of the*William,* on being informed thereof, immediately caused a second warrant for her arrest to be obtained and executed against her, being the earliest period at which the *Bold Buccleugh* could be arrested, and whereupon the Respondents abandoned absolutely, and caused to be discontinued, the suit so of necessity commenced by them in the Court of Session in Scotland, and in which Court accordingly there was no longer any suit pending. That the present owner of the *Bold Buccleugh,* at the time of the purchase from her former owners, well knew of the unsatisfied claim, outstanding against her, on account of the damage done to the *William,* and did provide or might have provided accordingly.

In reply, it was pleaded, that the present owner of the *Bold Buccleugh*, being advised that he had an interest to oppose the dismissal of the suit in the Court of Session in Scotland, on the 6th of November instant, being the day on which the warrant was given in; the agent for the Defenders in the said suit alleged in Court, before the Judges then present, that the Defenders had an interest to oppose the motion for leave to abandon the suit, and intended to assist the present owner of the *Bold Buccleugh*, interested to maintain the defence, whereupon the Judges allowed the Defenders to put in a minute of answer between that day and the 8th of the same month, and also a minute professing to assist the then new Defender referred to; that on the 9th of the said month, in consequence of the Defender having failed to lodge any minute as aforesaid, the Court dismissed the action, but that such **[272]** order of dismissal was not final, and that the agents of the Defender had lodged an application to the Court, to recall the same, and grant permission to state the grounds upon which the present owner of the*Bold Buccleugh* contended that he had a sufficient interest to oppose the said dismissal, and that the dismissal or otherwise of the said suit still remained subject to the order of the Court, to be made in the matter of the said application. That the present owner of the *Bold Buccleugh* was not aware, at the time of the purchase of the same, that there was any unsatisfied claim outstanding against her, on account of the damage sustained by the W*illiam*, or on any other account, nor did provide, nor could have provided, accordingly.

The rejoinder alleged, in reference to the averment, that the order of dismissal was not final, that the application to the Court of Session in Scotland had not only been made by the Defenders, but had been granted, and that they Defenders, having complied with the orders of the Court, in reference to the lodging of the minutes,. the question of the dismissal of the suit was, on the 6th of December instant, fully argued before the Court of Session, and the suit was then finally dismissed.

On the Act of Protest being brought in, an affidavit of the Appellant was filed, which stated, that he had no notice of the unsatisfied claim by the *William* against the *Bold Buccleugh*, when he purchased the steamer. The owners of the *William* also filed an affidavit by their attorney in Scotland, from which it appeared, that, subsequent to the second action being brought in England, they had offered to abandon the Scotch suit, and that, though this was opposed by the Appellant, who applied to be made a party, yet, in **[273]** respect of this abandonment, the suit was at length finally dismissed, by the Court of Session, on the 6th of December, 1849.

The Judge of the Admiralty Court (the Right Hon Dr Lushington), by his judgment (reported nom *The Bold Buccleugh* (1850) 3 W Rob 220), pronounced on the 18th of January 1850, overruled the protest containing the plea of *lis alibi pendens* to the Court's jurisdiction, holding, first, that the proceedings in Scotland had been abandoned by the owners of the *William*, at the earliest possible time they could withdraw the action after the second arrest; and, secondly, that the mere transfer of the property in the *Bold Buccleugh* did not release the purchaser from the responsibility of the original collision.

From this judgment the present appeal was brought. It was first argued before the Judicial Committee on 18th December 1850 – before Lord Langdale, Mr Baron Parke, Sir Herbert Jenner Fust, and Sir Edward Ryan.

Two, questions are raised for the Court's consideration upon these pleadings:–
First, whether the plea of *lis alibi pendens*, not a good defence in abatement of the suit; and secondly, whether the ship was liable by a proceeding *in rem* as against the present owner, he being a purchaser for a valuable consideration, without notice of the damage

Upon the first point: In collision, the action is transitory, and could have been brought, in England, Scotland, Ireland, or France, but not in two Courts at the same time; the steamer was arrested in Scotland, under process issued out of the Court of Session, a competent Court, having jurisdiction to entertain such a suit, the Court of Session Act 1830, 11 Geo 4 and I Will 4, c 69, s 21. And the proceedings were, carried on according to the form of process prescribed by the Statute, **[274]** 6 Geo 4 c 120.

[Sir John Jervis: The ancient maritime jurisdiction in Scotland is explained by Erskine, *Institute of the Law of Scotland*, I, tit III, sec 34.]

The history of the Court of Admiralty in Scotland is fully treated of by Bell, *Commentaries*, I, 497. Such suit was pending in that country when, the second warrant was extracted and the Bold Buccleugh arrested in England for the damage in question, the subject of the Scottish suit. It is contrary to, every principle of justice, that a party shall be sued in two, different Courts for the same subject matter, at one and the same time; the plea, therefore, of *lis alibi pendens*, in abatement of the English suit, was proper, and ought to have been allowed. *The Mayor of London v B* (1675) 1 Freeman 401, 89 ER 298; 3 Keb 491, 84 ER 838 [1]; Com Dig, tit. "Abatement," H. 24; Bac Abr, tit *Abatement*, M. Gilbert's *History of Common Pleas*, pp 254-5-6.

—

[1] The report of mayor of *London v B* states that it is also reported at 3 Keb 491, but there is no such case there. It should perhaps be a reference to *Hutchinson v Thomas* (1674) 3 Keb 491, 84 ER 838, which is concerned with *lis alibi*.

—

[Sir John Jervis: Suppose a suit for bottomry, and a suit for salvage, could the vessel be arrested in both suits?]

It is different here; the two suits are for the same cause of action, and the practice of the Admiralty Court is against the allowance of a second suit for the same subject. *The Fortitudo* (1815) 2 Dods 58, 165 ER 1415.

[Mr Pemberton Leigh: The proceedings are of a different nature; in Scotland, it appears from the protest, that the process is against the person of owner; in the Admiralty Court in England it is *in rem*.]

The arrest of the steamer is in the nature of a foreign attachment. *The Johann Friederich* (1839) 1 W Rob 37, 166 ER 487. A proceeding *in rem* merely to compel appearance. Foreign attachment exists in Scotland as in the City of London.

But, secondly, we submit, that by the bona fide sale **[275]** of the steamer to the Appellant, subsequent to her release upon bail, and before her arrest at Hull, the property in her was absolutely transferred to him, and that she was not liable for the damage, by a proceeding *in rem*, in the Admiralty Court in England. The *locus contractus* was Scotland, and the purchaser's rights are governed by that law. Story, *Conflict of Laws*, ch viii, sec 242(1), sec 286, c (2 Edit). The remedy by the law of Scotland, is *in personam*: Shand, *Practice of the Court of Session*, p 413; and see Erskine, *Institute*, III, sec 37. At the time of the purchase, the Appellant was in ignorance of any outstanding liability against the steamer, on account of the damage caused by her to the William, and it will be a great hardship upon him if he is to be held liable for the consequences of a misfeasance committed by the vessel, at a time when he was not her owner. There is no, knowledge of the damage or fraud imputed to the purchaser: the steamer had been released upon bail, so that he cannot be fixed with notice before his purchase. In the case of *The Alexander* (Larsen) (1841) 1 W Rob 288 at 294, 166 ER 580, the Court said that they would protect "subsequent purchasers without notice."

[MR PEMBERTON LEIGH – The plea does not show what was the nature of the bail in Scotland, what in fact it was for. Ought, not that fact to have been pleaded?]

The effect of the steamer being released was to render the then owners personally liable for the damage. No lien attaches upon a ship for damage. *The Volant* (1842) 1 W Rob 387, 166 ER 616; *The Druid* (1842) 1 W Rob 399, 166 ER 619. And the only reason for the arrest of the ship, is, to quote the language of Dr Lushington in *The Volant* (supra), that such "arrest offers the greatest security for ob- **[276]** taining substantial justice, in furnishing a security for prompt and immediate payment."

The Attorney-General (Sir Alexander Cockburn), and Dr Addams, for the Respondents

First. The plea of *lis alibi pendens* of a suit in Scotland is no bar to the jurisdiction of the Court of Admiralty in England entertaining the present suit for damage. In *Foster v Vassall* (1747) 3 Atk 587, 26 ER 1138, Lord Hardwicke decided, that if an action was brought in England, and the Defendant pleaded to it, an action in Ireland, or the plantations, it, would not be a bar to the jurisdiction of the Court in England. So in *Dillon (Lord) v Alvares* (1798) 4 Ves jun 357, 31 ER 182, a plea of a suit depending in the Court of Chancery in Ireland, for the same matter, was overruled by Lord Loughborough. Again, in *Maule v Murray* (1797) 7 TR 470, 101 ER 1081, a defendant who had been arrested in America, under a process out of the Court, was arrested again in this country for the same cause of action, and the Court of King's Bench refused to discharge him out of custody. An American writer, Kent, *Commentaries*, vol 2, p 124, 2nd ed, in treating of *Lis pendens*, refers to Merlin, *Répertoire*, tit *Judgment*, sec 6, and

Pardessus, *Droit Commercial*, t 5, 1488, in which the French Court overruled a plea of a foreign judgment in bar to a new suit for the same cause of action. Admitting that two suits could not be sustained in two Courts of concurrent jurisdiction, for the same subject-matter, and that, the second suit would be bad, yet in this case the objections to the plea are twofold: first, the suit was originally instituted in England; and, secondly, the relief sought by the proceedings in Scotland was totally different from that in England. In the **[277]** former country the proceedings are *in personam*; in the latter the remedy is *in rem*. The same rule prevails in America. *The Nestor*, 1 Sumner 73, 18 Fed Cas 9 (1831). In that case Mr Justice Story lays it down as unquestionable, that whenever a lien or claim is given upon the thing by the Maritime law, the Admiralty Court will enforce it by a proceeding *in rem*. The case of *The Aline* (1839) 1 W Rob 111, 166 ER 514, strongly illustrates our position, that a lien attaches in case of damage, and that the proceedings in the Admiralty Court in England are *in rem*. It has no resemblance to foreign attachment in the City of London. Here a lien attaches by reason of damage, and the Admiralty Court enforces it by a proceeding *in rem* against the ship. The observations of Dr Lushington in the case of *The Johann Friederich* (1839) 1 W Rob 37, 166 ER 487, were extrajudicial.

Secondly. The fact of the Appellant being a *bona fide* purchaser without notice of the damage, will not avoid the liability of the steamer. Such liability attached at the moment of the collision, creating a lien which followed the ship into whosesoever hands she might come. At the most, if the Appellant was imposed upon, and the fact of the damage occasioned by her designedly kept from him, his remedy will be to seek for redress against the former owners by an action at law. It is no defence to this proceeding, which is a proceeding *in rem*.

The case stood over for consideration.

On 16th May 1851, their Lordships (Lord Langdale, Mr Baron Parke, Sir Herbert Jenner Fust, and Sir Edward Ryan) directed the appeal to he re-argued by one Counsel on each side, upon the question, whether the*bona fide* sale of the vessel after **[278]** the damage, without notice to, the purchaser, discharged the vessel from liability.

The case was re-argued before a differently constituted committee, on that point on 10th December 1851.

Mr J. Anderson QC, for the Appellant.

The reserved point involves a question of the first importance to shipping interests; it is confined to this, whether a lien arises out of damage; and, if so, whether it follows the vessel causing the damage into whosesoever hands it comes. It must be considered under two heads:–

First. It is submitted, that no lien attaches by reason of damage. A lien on ships may be created, by bottomry, mortgage, salvage, and wages, but there is no authority to be found in the books that it extends to damage. In the case of *Volant* (1842) 1 W Rob 387, 166 ER 616, the learned

Judge of the Admiralty Court laid down the rule of law to be, that "the damage confers no lien upon the, ship," and this opinion is confirmed in the case of*The Druid* (1842) 1 W Rob 391 at 398, 166 ER 619. Liens are not favourites of the law. The onus lies upon the Respondents to establish such lien, *The Alexander* (1842) 1 W Rob 346, 166 ER 602: it cannot be inferred. As then there was no lien for the damage in this case, the arrest of the steamer must be considered in the nature of an attachment only.

[SIR JOHN JERVIS. Abbott, in his treatise *On Shipping* (6th ed by Shee, pp 121-2), lays it down, that by the Civil law, all who, repaired, or fitted out a ship, or lent money to be employed in those services, had a lien, without any instrument of hypothecation. At Common law, what is called a "lien" is more strictly construed, and is only when the thing is in actual or constructive possession.]

There is no lien upon the **[279]** steamer. The Court of Admiralty has undoubtedly jurisdiction in cases of collision, and the proceedings in the first instance is *in rem* against the ship; but the arrest of the ship is only to compel, the appearance of the owners; if they appear, the question is then to be decided according to the interests of the parties, without reference to the liability of the ship causing the collision.

[SIR JOHN JERVIS. When does the proceeding *in rem* commence?]

It is only a mode of compelling appearance analogous to foreign attachment in the City of London. *The Johann Friederich* (1839) 1 W Rob 37, 166 ER 487. The mode of procedure is this: the ship is arrested under a warrant, and if the owners do not appear and give bail, the ship is sold. If they appear, then the proceeding is *in personam*. *The Aline* (1839) 1 W Rob 111, 166 ER 514; *The Hope* (1840) 1 W Rob 154, 166 ER 531;*The John Dunn* (1840) 1 W Rob 159, 166 ER 532. Foreign attachment like that of the City of London prevails in Scotland, and the sole object of that attachment is to compel appearance.

[SIR JOHN JERVIS. It seems more like a proceeding in the Exchequer to recover a Crown debt, which is against the person and the goods. In a note to *Turbill's case* (1667) 1 Wms Saund 67 n1, 85 ER 76, the doctrine of foreign attachment is fully examined, but it appears to bear no analogy to a proceeding *in rem* in the Admiralty Court.]

In equity, if a vendor keep the title deeds and conveyance of the estate, as a security for part of the purchase money unpaid, he will have an equitable mortgage on the estate, and this lien prevails against the purchaser and his heir, but the vendor's lien is not good against a purchaser for valuable consideration without notice: Sugden, *Vendor and Purchaser*, 536; 1851 ed. Proceedings in the Admiralty Court most resemble **[280]** the case of cattle damage feazant being sold. There the proceeding is also *in rem*, but then it must be taken at the time. As, therefore, there was no lien upon the steamer for the damage, what was the effect of her release in Scotland, after the arrest, which was a mere *modus procedendi*? Why, upon the owners appearing and giving bail, the proceedings *in rem* terminated, and the remedy became *in*

personam. Bail in the Court of Admiralty is regarded as a pledge for the thing itself. *The Nied Elwin* (1811) 1 Dods 50 at 53, 165 ER 1229. The object being not to make available any lien, for such did not exist but merely to get a fund to satisfy the damage. The release discharged the steamer from arrest, and left her in *statu quo*, as before the arrest. The suit in Scotland being, therefore, for the same cause of action, and the proceedings being substantially the same, the plea of *lis alibi pendens* was a bar to the action.

[SIR JOHN JERVIS. You need not go into that question, as we have made up our minds upon that plea.]

Secondly. There being no lien upon the steamer, haw can this indefinite claim of damage travel with her wherever she goes? Can a ship, which at some former time may have, caused a collision, and which may have subsequently passed through various owners' hands, be arrested in any part of the world she may be for this damage? Surely not; for, if so, the rights of third parties, including innocent purchasers without notice, would be involved.

[SIR FREDERICK POLLOCK. Suppose the case of a collision upon the sea, caused by a vessel going to India, and the ship sold there, is not the vessel liable to be seized when she returns to England for the damage?]

The damage **[281]** founds no lien, and her arrest is only to compel appearance. Our proposition is, that the steamer being released, there is no unsatisfied liability left; the presumption being, that the damage is satisfied, and the bail taken in substitution of the steamer.

Dr Addams for the Respondents.

This is a proceeding *in rem* in the usual form against the steamer itself, and not *in personam* against the owners. The proposition now urged by the Appellant is quite novel, and certainly untenable. Proceedings in the Admiralty Court in cases of damage are *in rem*, and that has been the practice for this last forty years. Such an objection as this has never been urged before; even in this case it was not taken in the Court below.

Judgment was reserved, and now (April 24, 1852) delivered by –

SIR JOHN JERVIS. There were two questions in this case: First, the effect of the pendency of another proceeding in Scotland for the same cause of action. Secondly, the liability of the vessel by a proceeding *in rem*after a *bona fide* sale, without notice.

It is manifest that these two defences are of a totally different nature; the first being a declinatory plea properly the subject of a protest; and the second, an absolute bar. Generally, it is inconvenient to depart from the settled rules of procedure, and to raise such questions differing in degree by the same defence; but as the Court below did not object to this course, we

merely notice it to observe, that we do not approve of such a proceeding, and pass on to deliver our opinion upon the two points raised.

Upon the first point we have not, from the com- **[282]** mencement of the discussion, entertained any doubt; but we desired the second question to be re-argued, because it was of great general importance, and because we were unable to find any authorities bearing directly upon it; and some of the cases to which we were referred, were apparently conflicting with each other.

The course which was taken upon the second argument, makes it convenient to dispose of the second question in the first instance.

It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding *in rem* against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners; that the damage confers no lien upon the ship, and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, dicta have been referred to, which are entitled to great respect, but which, upon consideration, will be found not to support the propositions for which they were cited. In*The Johann Friederich* (1839) 1 W Rob 37, 166 ER 487, Dr Lushington is reported to have said that proceedings *in rem* in the Court of Admiralty were analogous to those by foreign attachment in the Courts of the City of London. For the purpose for which that allusion was made, viz, the liability of the property of foreigners to be arrested by process out of the Court of Admiralty and the Courts of the City of London, the two, proceedings may be analogous; but in other respects they are altogether different. The foreign attachment, is founded upon a plaint against the principal debtor, and must be returned *nihil* before any step can be taken against the garnishee; the pro- **[283]** ceeding *in rem*, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case, the proceedings are *in personam*, in the latter, they are *in rem*. The attachment, like a Common Law distringas, is merely for the purpose of compelling an appearance; and if the Defendant appears within a year and a day, even after judgment and execution, against the garnishee, and puts in bail, the attachment is at an end. If the owners do not appear to the warrant arresting the ship, the proceedings go, on without reference to their default, and the decree is confined exclusively to the vessel. Many other distinctions will be found upon reference to the notes to *Turbill's case* (1667) 1 Wms Saund 67 n1, 85 ER 76. It is not correct, therefore, to say, that the proceeding *in rem* is in all respects analogous to the proceeding by foreign attachment, and that the former is merely to compel an appearance, because the latter is undoubtedly for that purpose only.

In all proceedings *in rem*, whatever be the foundation of the jurisdiction, the warrant is the same, and the proceedings are conducted in the same, form, and there is no reason for saying that a different rule is to prevail, where the foundation of the jurisdiction is a collision, from

that which is admitted to be the practice, when the suit is instituted for salvage, or the recovery of wages against the ship.

But it is further said, that the damage confers no lien upon the ship, and a dictum of Dr Lushington, in the case of *The Volant* (1842) 1 W Rob 387, 166 ER 616, is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cases 508), it seems doubtful whether the learned Judge did use the expression attributed to him by **[284]** Dr W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely, not necessary for the decision of that case, cannot be taken as a binding authority.

A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesover possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean, a claim or privilege upon a thing to be carried into effect by legal process; and Mr Justice Story (1 Sumner 78 [2]) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty forces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosesoever possession it may **[285]** come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case, and which is deduced from the Civil Law, cannot be better illustrated than by reference to the circumstances of *The Aline* (1839) 1 W Rob 111, 166 ER 514, referred to in the argument, and decided in conformity with this rule, although apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the Court held, that the claim for damage in a proceeding *in rem*, must be preferred to the first bond-holder, but was not entitled against the second bond-holder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bond-holder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would he bound by that transaction.

[2] *The Nestor*, 1 Sumner 73, 18 Fed Cas 9 (1831).

This rule, which is simple and intelligible, is, in our opinion applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come.

[286]

The remaining point may be disposed of in a few words. The pleadings show that the proceedings in Scotland were commenced by process against the persons of the Defendants, and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding *in rem* differs from one *in personam*, and it follows, that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other.

For these reasons, we are of opinion, that the judgment of the Court below must be affirmed, with costs.