standing, and have, so far as I know, been accepted as sound.

"The result is that the appeal will be dismissed."

Counsel for the County Council — H. Johnston — Macphail. Agents — M'Neill & Sime, W.S.

Counsel for the Assessor — J. Wilson. Agent—James Hope, W.S.

Friday, May 24.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'KNIGHT *v.* CURRIE AND OTHERS.

Ship—Maritime Lien—Damage Caused to One Ship by Act of Master of Another Ship.

The "maritime lien" recognised in England for damage caused directly by one ship to another, as in cases of collision, is unknown to the law of Scotland.

The steamships "Dunlossit" and "Easdale" being moored alongside one another at a pier when a gale sprang up, the master of the "Dunlossit," in order to prevent injury to that vessel, cut the "Easdale" adrift, with the result that she went ashore and sustained considerable damage. For this damage the owners of the "Dunlossit" were found liable in an action at the instance of the owner of the "Easdale." The "Dunlossit" was subsequently sold by warrant of the Sheriff in an action at the instance of a party holding a mortgage over her, and competing claims on the price were lodged by the mortgagee and the owner of the "Easdale," the latter maintaining that he had a "maritime lien" over the "Dunlossit" for the damage sustained by his vessel. The Court *preferred* the mortgagee.

Held (1), by the Lord Justice-Clerk, Lord Young, and Lord Trayner, that the doctrine of maritime lien, which had been recognised in England in cases of damage caused by collision, was unknown to the law of Scotland; and (2), by the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner, that even if the doctrine had existed in the law of Scotland, it would not have applied to the present case.

Upon 18th November 1893, while the steamers "Dunlossit" and "Easdale" were lying alongside each other at Portaskaig Pier, Islay, a gale sprang up, and the master of the "Dunlossit," in order to avoid injury to that vessel, cut the "Easdale" adrift, with the result that she drifted across the Sound of Islay and went ashore on the Island of Jura, sustaining considerable damage.

To recover the loss sustained, John Currie, the owner of the "Easdale," brought an action of damages against the owners of the "Dunlossit" in the Sheriff Court at Glasgow, and the action having been appealed, the First Division on July 17, 1894, pronounced an interlocutor in which they found that the owners of the "Dunlossit" were liable to the owner of the "Easdale" for the damage which that vessel had sustained, with expenses in both courts, and on the motion of both parties remitted to the Sheriff of Lanarkshire to ascertain the amount of damage (*ante*, vol. xxxi. p. 814, and 21 R. 1004).

Upon 2nd August 1894, Currie arrested the "Dunlossit," on the dependence of the above action, while she was lying in the harbour of Glasgow.

Upon 29th August, Samuel M'Knight, the builder of the "Dunlossit," who held a mortgage over her for £3250, raised an action in the Sheriff Court at Glasgow against the owners of the "Dunlossit" and the owner of the "Easdale," craving the Court to grant decree and warrant for the "Dunlossit" being sold, and her proceeds made forthcoming to him, at least so far as necessary to satisfy his mortgage.

Upon 28th September, the "Dunlossit" was sold under warrant of the Sheriff-Substitute for £2510 and the price consigned in the hands of the Clerk of Court, and thereafter the Sheriff-Substitute appointed parties having claims against the steamship to lodge them.

Claims were lodged by (1) M'Knight, the mortgagee; (2) the owner of the "Easdale" for the amount of damages and expenses which should be found due to him in his action of damages; (3) the charterer of the "Easdale," and (4) the owner of a fishing boat which had been moored to the "Easdale," and had been wrecked owing to her being cut adrift, for the loss they had respectively sustained; and (5) a nautical instrument maker for articles supplied to the "Dunlossit."

The mortgagee pleaded—"(1) The claimant having in virtue of the contract and mortgages referred to a preferable charge on said steamer, is entitled to be ranked preferably to the whole of the fund *in medio*."

The owner of the "Easdale" pleaded—"(2) The said John Currie having a maritime lien for the damage sustained by the s.s. 'Easdale' through being cut adrift by those in charge of the s.s. 'Dunlossit,' he is entitled to be ranked preferably to the pursuer."

Upon 19th January 1895 the Sheriff-Substitute (BALFOUR) pronounced this interlocutor — "Finds that the claimant Currie has a maritime lien over the steamer 'Dunlossit' for the damage sustained by his steamer 'Easdale,' through its being cut adrift by the master of the 'Dunlossit,' and for the expenses incurred by him in vindicating his claim of damages: Finds that the damages amount to £407, 4s. 6d., and the expenses to £207, 13s. 9d., as ascertained in the action against the owners of the 'Easdale': Therefore ranks the said claimant Currie on the fund *in medio* preferably for said sums and interest on the first-mentioned sum from 7th December

1893; and authorises the Clerk of Court to pay said sum and interest accordingly: Finds the claimant M'Knight liable to him in expenses."

"*Note.*—This action refers to the proceeds of sale of a steamer called the 'Dunlossit,' which was sold under warrant of this Court. The sale was the outcome of an action against the 'Dunlossit,' at the instance of the owners of the steamer 'Easdale,' for damage done to the 'Easdale' at Portaskaig on 18th November 1893 by the master of the 'Dunlossit' cutting her adrift. The action was determined by the Court of Session in favour of the 'Easdale,' and the Court, *inter alia*, pronounced the following findings, viz.—'Find that the master of the 'Dunlossit,' in cutting the moorings of the 'Easdale,' acted without any consent or authority from anyone representing the 'Easdale,' and in the knowledge that by cutting her moorings he exposed her to the certainty of her being driven out to sea, and to the probability of serious damage; that the master of the 'Dunlossit' so acted solely for the protection of the 'Dunlossit' against present and possible damage: Find in law that in so cutting the moorings of the 'Easdale,' the master of the 'Dunlossit' made the defenders liable for the damage resulting to the 'Easdale."

"The claimants on the fund are—(1) the mortgagee of the 'Dunlossit'; (2) the owner of the 'Easdale'; (3) the charterer of the 'Easdale'; (4) the owner of a fishing-boat which lay at the quay moored to the 'Easdale'; and (5) a nautical instrument-maker for certain articles supplied to the 'Dunlossit.'

"The question which arises for determination at present is whether the mortgagee of the 'Dunlossit' has a preferable claim to the proceeds in virtue of his mortgage, or whether the owner of the 'Easdale' and the other parties who have sustained damage through the cutting adrift have a preferable claim in virtue of their alleged maritime lien.

"The mortgagee maintains that the owner of the 'Easdale' and these other parties have no maritime lien in respect that there was no collision between the steamers in the sense of the steamers coming in contact with one another, and that a maritime lien only arises when the vessels have collided, and the damage has been done by the ship as the physical cause. It is admitted that there was no collision between the steamers, and that the damage was caused by the wrongful act of the master of the 'Dunlossit' in cutting the 'Easdale' adrift, which act was executed by him for the protection of the 'Dunlossit,' and was performed within the scope of his authority, and made his employers liable for the damage.

"A maritime lien arises where a ship in the course of her employment collides with or causes injury to another ship through the fault of those in charge acting within the scope of their authority. It is a right which is inchoate from the moment of collision, and is enforced against the ship by an action *in rem* in the English Admiralty Courts. The right is clearly defined in the case of the '*Bold Buccleuch*,' 7 Moore P.C.C. 267, and since then it has often been the subject of consideration in the English Courts, but there is little or no authority in the Scotch law-books on the subjects. This maritime lien arises *ex delicto*, and takes precedence of charges on the ship arising *ex contractu*, such as mortgages, bottomry bonds, seamen's wages, &c. The question, however, arises whether, where there has been no actual collision, but where damage has merely been done to another ship by the wrongful act of the master of a ship, done for the benefit of his ship and within his authority, the maritime lien attaches. One does not see why, according to the ordinary sense of things, the lien should not attach in the one case as much as in the other, because the essence of liability and of the emerging claim of lien is delict on the part of a master acting for the benefit of his ship and within his powers. There is no apparent reason why the offending ship should not be liable merely because she does not strike the other vessel. The delict is present, the authority to the master is also present, and the thing is done for the benefit of his own vessel.

"There have been various decisions which seem to substantiate this view. I may in the first place refer to the well-known authority on collisions, Mr Marsden, who says in his work on that subject at page 27, that, where by the negligent navigation of one ship a collision occurs between two others, the owners of the ship in fault are liable at law, and the ship, it seems, is liable in Admiralty. He states also at page 85 that if one ship is injured by the negligence of those in charge of another ship, without actually being in contact with the latter, the wrongdoing ship may be sued in Admiralty *in rem*, and there are strong grounds for holding that in these, as in other cases of damage, the lien attaches. He refers to the cases of the '*Wheatsheaf*,' 2 Mar. Law Cases, O.S. 292; the '*Orient*,' L.R., 3 P.C.C. 696; the '*Industrie*,' L.R., 3 A. and D. 303; the '*Energy*,' *ibid.* 48; and the '*Batavier*,' 9 Moore P.C.C. 286. I may refer to three of these cases—the '*Orient*,' the '*Industrie*,' and the '*Batavier*.' In the '*Orient*,' proceedings were taken *in rem*. In this case a vessel—the 'Georgiana'—was beached for repairs, and the 'Orient' was moored alongside of her. When the tide rose the 'Orient' was jammed against the 'Georgiana,' and damaged her. It was held that there was a remedy both *in personam* and *in rem*. The '*Industrie*' was a case in which damage was done to a ship by stranding while avoiding a vessel which blocked a fairway, and exhibited no lights, and the Court held that there was a good cause of action, and that the Court had jurisdiction. In the course of pronouncing judgment, Sir Robert Phillimore said that there had been some fluctuation in the decisions as to the extent of the jurisdiction of the Admiralty Courts in cases of damage, but he thought it was now established that the Court had jurisdiction where damage had been done, or received by a ship, although there might

not have been any collision between two or more ships. The case of the '*Batavier*' was pronounced long before the '*Industrie*,' and it was there decided that a large steamer proceeding up a river at a speed dangerous to small craft was liable for the damage done to a barge, in respect that the steamer caused such a swell that the barge sank. These cases were all decided in the Admiralty Court, and except in the case of the '*Industrie*,' no objection appears to have been taken to the competency of the proceedings as arising out of collisions.

"But the mortgagee maintains that the statute of 24 Vict. cap. 10 (The Admiralty Court Act 1861), extending the jurisdiction of the High Court of Admiralty, shows that there can be no maritime lien unless there is an actual collision. The seventh section of that Act provides that the High Court of Admiralty shall have jurisdiction over any claim *for damage done by any ship;* and it is argued that the damage must be done by the ship as the physical cause. There were two cases referred to in support of this view, the '*Vera Cruz*,' L.R., 9 Prob. Div. L.R. 96, and the '*Theta*,' L.R. 1894, Prob. Div. 280. In the first case the Master of the Rolls said that the seventh section of the 1861 statute gives jurisdiction over a case in which the ship was the active cause, the damage being physically caused by the ship, and Mr Justice Bowen said that the damage must be done by those in charge of a ship with the ship as the noxious instrument. It has to be noted, however, that the Court was dealing with an action under Lord Campbell's Act in respect of the death of the master of a ship who was drowned after his vessel had been run down. The other case, the '*Theta*,' is a judgment of Mr Justice Bruce, and has reference to a claim for personal injuries sustained through a man falling into the hold of a vessel owing to the hatchway being only covered with a tarpaulin at the time the man was crossing to his own ship. The Judge held that the ship could not be said to be the active cause of the damage.

"With reference to the Statute of 1861, and to the decisions referred to, I am of opinion—(1st), that the statute does not interfere with the common law right of maritime lien. This lien is a right at common law, and is not the creature of statute, and the Act of 1861 relates to the remedies and not to the rights of suitors. See the dicta of Lord Halsbury in the '*Sara*,' L.R., 14 App. Cases (H.L.) 209, and of Lord Watson in the '*Heinrich Björn*,' L.R., 11 App. Cases, 270. And (2nd) that the cases of the '*Vera Cruz*' and '*Theta*' are not parallel cases to the present, because actions for personal injuries are quite different in their character from an action of damages for having one's ship sacrificed to benefit another ship. See Abbott on Shipping (13th edn.), p. 1081, footnote (R). The damage in the present case was not done to a seaman drowned after the 'Easdale' was cut adrift, nor to a seaman crossing the deck of the 'Dunlossit,' but it was done to the 'Easdale' by cutting her ropes so as to save the 'Dunlossit.' It cannot be said to have been done by the 'Dunlossit' as the physical cause, in the sense at least of the 'Dunlossit' striking the 'Easdale,' but it was done by her master for her protection. It might be said that the master was in this case so identified with his ship, and committed the wrongful act so entirely in her interests, that to all intents and purposes the act was committed by the ship. In the '*Tasmania*,' L.R., 13 Prob. Div. 110, the President said, though a ship is commonly spoken of metaphorically as if it were itself capable of doing a wrong, it is an instrument in the hands of the navigators, and its liability will depend upon whether those navigators can be identified with the owners or their agents. See also Lord Justice Selwyn's remarks in '*The Halley*,' L.R., 2 P.C. p. 193.

"Under any circumstances I am unable to see that there is any valid reason for holding that a maritime lien arises in the case where two ships actually collide, and that it does not arise where the master of a ship acting within his powers damages another ship in order to preserve his own ship.

"Another question remains—whether the lien covers the expenses incurred by the owners of the 'Easdale' in vindicating their claim against the owners of the 'Dunlossit.' The mortgagee maintained that the lien only applied (if there was a lien) to the actual damage incurred by the 'Easdale,' and not to the costs incurred by the owners in vindicating their claim. It was said that the mortgagee had nothing to do with any action at law which the 'Easdale' required to take against the 'Dunlossit.' I am of opinion, however, that the lien attached at once to the 'Dunlossit' as soon as the damage was incurred, and that the expenses incurred in vindicating the claim are an accessory of the damage, and are covered by the maritime lien. The lien might be worthless if it did not cover the necessary expenses incurred in vindicating the claim of damage. That is to say—the expenses might be more than the damage."

The mortgagee appealed, and argued—The doctrine of maritime lien in cases of damage resulting from collision was an English doctrine which was unknown to the law of Scotland. None of the institutional writers on the law of maritime hypothec mentioned it—Stair, i. 13, 14, 15; Bell's Comm. (7th ed.) i. 562, 563, 577, ii. 26, 38. Being a tacit hypothec it must be shown to be well established before it could be given effect to. The doctrine differed in principle from the liens recognised by Scots law, for it did not require possession, and possession was the foundation of the Scots law of lien—Bell's Prin. sec. 1420. The sailor's lien for wages depended upon possession—*Sands, &c.* v. *Scott*, 1708, M. 6261; *Seamen of the "Golden Star"* v. *Milne, &c.* 1682, M. 6259. The mere fact that a rule of law existed in England was no sufficient ground for recognising it in Scotland—*Royal Bank of Scotland* v. *Saunders & Sons' Trustees*, July 10, 1882, 9 R. (H. of L.) 67; *Palmer*

v. *Wick and Pulteneytown Steam Shipping Company*, June 5, 1894, 21 R. (H. of L.) 39. Even in England the rule was novelty—Marsden on Collision, 79 (i.) It had been introduced in the case of the "*Bold Buccleugh*," 7 Moore's P.C. Reps. 267. The doctrine arose from the practice in the Admiralty Court in England, where the proceedings were *in rem* against the ship. This was distinctly recognised in the case of the "*Bold Buccleugh*," because there the Judges held that an action in the Court of Session for damages cause by the collision did not found a plea of *lis alibi pendens*, as the Scottish action was *in personam*, the arrestment there used being only collateral to secure the debt. The proceedings being *in personam* in Scotland, the circumstances which gave rise to the rule in England did not exist. The Scots form of process gave a full remedy, and there was therefore no need to introduce the English remedy. The anomalous nature of the lien was shown in the case of the "*Vera Cruz*," 1884, L.R., 9 Prob. Div. 96. The rule was inequitable, and should not be introduced into Scotland. It had been thought so oppressive in England that the Courts had modified its original severity to the effect that if the ship was not under the owner's control at the time of the collision as in a demise by charter-party the lien was not absolute and would not apply. The "*Tasmania*," 1888, L.R., 13 Prob. Div. 110. II. The lien was only created by actual collision, and here there was no collision. It would be carrying the case much further than had been done in England if the lien was held to apply under the circumstances of this case, where the ship was not the instrument of damage. It was true that some cases had occurred where the one vessel had not actually struck the other, but the damage had always resulted from the action of the ship itself. The lien was in fact justified in England by regarding the ship that did the damage as the actual delinquent—"*Industrie*," 1871, L.R. 3 Ad. and Ecc. 303; "*Batavier*," 1854, 9 Moore's P.C. Reps. 286. Even if jurisdiction existed in the Court of Admiralty, it did not follow necessarily that maritime lien existed. Every proceeding *in rem* did not involve its existence—*The* "*Rio Tinto*," 1883, L.R. 9 App. Cas. 356; *The* "*Orient*," 1871, L.R., 3 P.C.C. 696; *The* "*Sara*," 1889, L.R. 14 App. Cas. 209; "*Tasmania*," L.R., 1888, 13 Prob. Div. 110, *per* Sir J. Hannen at p. 117; *The* "*Theta*," L.R. 1894, Prob. 280; *The* "*Heinrich Björn*," 1886, L.R., 11 App. Cas. 270; Abbot on Merchant Shipping, 869-893. III. As regarded the expenses of the former action, they could not be claimed, because that would make the mortgagee pay the expenses of an unsuccessful defence to a legal claim over which he had no control, and which perhaps he would not have allowed if he had had the power to prevent it.

The respondent argued—The principle upon which a maritime lien for collision existed and took preference over a mortgage as stated in the decisions was that the mortgage might extend practically to the whole value of the ship, thus making the mortgagee, as in this case, the practical owner of the vessel. The mortgagee could protect himself by charging a high rate of interest, but the sufferer from a collision had no such power, he must proceed against the ship. There were other maritime liens known in the law of Scotland, *e.g.*, for salvage and seamen's wages, and although admittedly there was no authority as regarded a lien for damage caused by collision, it was only extending a known principle a little further, and in an equitable direction—"*Johann Friedrich*," 1839, 1 Robinson's Adm. Rep. 35. *The* "*Charles Amelia*," 1868, L.R., 2 Adm. and Eccl. 330; *The* "*Two Ellens*," 1872, L.R. 4 P.C. App. 161. In the case of the "*Aline*," 1839, 1 Robinson's, Adm. Rep. 3, the circumstances were almost identical with the present. It was not a mere matter of process, but was founded on public policy. The action *in rem* did not make the maritime lien necessary; it was the fact that a maritime lien existed that made the action *in rem* the proper form of process—*Rock Island Bridge*, 1867, 6 Wallace's American Rep. 213; *The* "*Sara*," 1889, L.R. 14 Ap. Cas. 209. The fact that in Scotland the remedy was an action *in personam* with a right to arrest the ship in security did not displace the reason for recognising the lien, as that was merely a difference in process. The lien enabled justice to be done to all concerned. Unless it existed the master of a foreign ship might sail home and dispose of his vessel, and if it was the only asset, the injured party would be left without remedy. It was equitable to hold it preferable to a mortgage and all other claims except salvage—Smith's Admiralty Law and Practice (4th ed.) 44; *The* "*Aline*," 1839, 1 Robinson's Adm. Rep. 111; *The* "*Elin*," 1882, L.R. 8 Prob. Div. 39. If England, with its great maritime experience, had found this remedy necessary, the example should be followed. Differences between English and Scots law where avoidable were to be discouraged—*Hay and Others* v. *Le Neve and Others*, 2 Shaw's App. 395. II. The theory that the ship herself must do the act which led to the collision was not supported by authority. The true foundation for the remedy was delict—*The* "*Druid*," 1842, 1 Robinson's Adm. Rep. 391. It was enough if, as here, the master was in fault—*The* "*Orient*," L.R., 3 P.C.C. 696; *The* "*Wheat Sheaf*," 2 Mar. Law. Cas. O.S. 292; *The* "*Industrie*," L.R., 3 Adm. and Eccl. 303; *The* "*Energy*," Ibid. 48; *The* "*Batavier*," 9 Moore, P.C.C. 286. The Court would distinguish between delict within and without the scope of the master's duty—*The* "*Druid*," 1842, 1 Robinson's Adm. Rep. 391. The owners were liable for the acts of the captain of their vessels, and he had cut the "Easdale's" cable in order to save his own ship. III. The lien covered the expenses of litigation carried on for the purpose of vindicating the claim of damage —*The* "*Margaret*," 1835, 3 Haggard Ad. Reps. 238; *The* "*Mellina*," 1848, 3 Robinson's Adm. Rep. 16; *The* "*Dundee*," 1827, 2

Haggard, 137; Coote's Admiralty Practice, 17.

At advising—

LORD JUSTICE-CLERK—The circumstances of this case are that two steam vessels were lying alongside one another at a pier when a gale sprang up, and the master of one of the vessels, the "Dunlossit," considering it necessary for the safety of his own vessel, cut the other, the "Easdale," adrift, in consequence of which the "Easdale" was injured. The important question which has arisen in the case is whether in the circumstances of the disaster the claimant, who is the owner of the "Easdale," has a maritime lien over the "Dunlossit" for the damage done and the expenses of vindicating his claim. It has been judicially found in another suit that the "Dunlossit" was in fault in cutting the moorings of the "Easdale." The liability of the owner of the "Dunlossit" for damages is therefore established. The only question of difficulty is whether the owner of the "Easdale" has a preferable claim to a mortgagee of the "Dunlossit" in respect of maritime lien.

The contention of the owner of the "Easdale" is that it is well established in England that in such a case as this there is a maritime lien under which the owners of the injured vessel have a preferable claim, that this is so in case of collision, that it has been extended to direct injury done by the ship without actual collision, as where in the case of the "*Batavier*," a large steamer, by running at high speed in narrow waters, caused a swell which sunk another vessel, or as in the case of the "*Industrie*," where a vessel, by blocking the fairway and failing to show lights caused another to go on shore. It is contended that, if such be the law in England, the law must be held to be the same in Scotland. Mr Johnston admitted in debate that this contention could not be held to have been given effect to in any previous case in Scotland, but maintained that he was not seeking to establish a principle — that the principle was already established for certain claims such as seamen's wages and salvage claims, and that, this being so, it was proper to extend it as it had already been extended in England. However advisable it may be that the law of the two countries in such a matter should be the same, it does not appear to me that this must be brought about by that being held to be the law of Scotland, which it is admitted is not so stated by the institutional writers, and which has never been so held in any decision that can be quoted. There is no case in Scotland even of direct collision in which this has been held, and I am not prepared to hold it to be the law of Scotland now. If it ought to be made the law of Scotland, as to which I say nothing, I do not think it ought to be done by our holding that to be law which has never yet been held, although there have been an abundance of cases in which it might have been maintained as plausibly as it is in this case. I will only add that if I had to consider the question of expediency, I do not at present see the grounds of equity which should confer such a lien to the detriment of other creditors.

But further, I do not think that to hold that the law as stated in England is also law in Scotland would aid the pursuer's case here, for his case must carry the law further than it has been carried hitherto even in England, if he is to succeed, All the cases quoted to us, both in the Sheriff-Substitute's note and at the bar, proceed upon the injury having been done directly by the ship as the physical cause through fault in navigation of those on board. As it is expressed by Mr Justice Bowen (*The "Vera Cruz,"* L.R. 9 Prob. Div. 96, at p. 101), the damage must be done by those in charge of the ship as the noxious instrument. I cannot hold that that was the case here. The action which led to damage in this case was not done by the ship. The ship was at rest moored to a quay. What was done was, that to prevent anticipated damage to the "Dunlossit" which was being pressed between the "Easdale" and the quay, the "Easdale's" moorings were cut. That is a case quite different from any one of the cases quoted. The "Dunlossit" was not in any sense an "instrument" causing the injury which resulted in the damage. I am therefore unable to agree with the decision at which the Sheriff-Substitute has arrived, and am of opinion that he has erred in giving a preferable ranking to the claimant Currie.

LORD YOUNG—The facts are stated accurately and with sufficient fulness by the Sheriff-Substitute in the note to his judgment, and the legal question which arises on them is interesting and important. The material facts are that the ships "Dunlossit" and "Easdale" being both moored to Portaskaig Pier the master of the former cut the moorings of the latter, sending her adrift and out to sea upon rocks, and that in so doing he acted for the protection of his own ship against which the other was bumping. In an action by the owners of the "Easdale" against the owners of the "Dunlossit" it has been decided that the master of the "Dunlossit" in cutting the moorings of the "Easdale" acted illegally, and so as to subject his owners in liability for the consequences, the result being decree for £407, 4s. 6d. of damages, and £207, 13s. 9d. of costs. The question now before us is whether for these damages and costs the owner of the "Easdale" has a lien, called in the English Court of Admiralty a "maritime lien," on the "Dunlossit" preferable to a prior mortgage in favour of the builders for the price at which they had sold it. The Sheriff-Substitute, proceeding on certain decisions in the English Court of Admiralty and passages in text-books on the law administered in that Court, has held that they have. I have read with much interest his clear and able remarks on these authorities, and am not prepared to say that he may not be right in thinking that the English Court

would on the facts here have decided the case as he has done, although it has not hitherto gone the length of holding that such maritime lien attaches for the consequences of the master (or owner) of one ship unwarrantably and illegally cutting the shore moorings of another ship and sending her adrift and on the rocks. Hitherto it has allowed this maritime lien only when one ship has in the course of navigation been brought into collision with another, and may possibly hold that the illegal cutting of ropes by which a vessel is moored to a quay present a case sufficiently different to be distinguishable.

But we are here concerned only with the common law of Scotland, and I think the Sheriff is right when he says, as he does, that there is no authority in the Scotch law books on the subject, meaning, of course, to the effect that there is by the common or customary law of Scotland a maritime lien such as the owners of the "Easdale" maintain. By the familiar enough common law of Scotland the owner of the "Easdale" may attach the "Dunlossit," as he may any other property of his debtors, upon the decree for damages and costs, but of a rule of our common law which gives him a lien therefor without any diligence or legal process, and a lien superseding any prior mortgage, there is no trace whatever.

I need hardly say that I have great respect for the opinions of the Judges of England, and observations made by them upon questions regarding which the rules and principles of the common law are the same in both countries. But if, as there appears to be reason for thinking, there is a rule of the common law of England which in a certain class of cases gives, without legal process, a lien for damages preferable to prior mortgages for debt, I can take no aid or enlightenment from Court of Admiralty decisions illustrative of that rule, for we have none such, and of course have no authority to make, but only to apply rules of the common law.

I may notice that the mortgagee of the the ship was no party to the decision that the master of the "Dunlossit" acted illegally, or so as to make any other than himself responsible. I assume, however, and of course, that the owner of the "Easdale" has a good decree for money against the owners and mortgagees of the "Dunlossit," and on that assumption am of opinion that he has by the common law of Scotland no lien which can compete with the mortgage.

LORD RUTHERFURD CLARK — On the main question whether this form of maritime lien exists in the law of Scotland, I desire to express no opinion; but even if it did exist, I am of opinion that this case would not fall under it.

LORD TRAYNER—Two questions arise for our decision in this case—(1) whether there exists in Scotland, recognised by our law, the remedy of maritime lien for damage arising from collision, which is recognised by the law of England and on which the Sheriff proceeds; and (2) assuming that such a maritime lien exists, whether this is a case where the maritime lien would attach.

With regard to the first question, I agree with Lord Young in thinking that the law of Scotland has never recognised or admitted the doctrine of maritime lien which exists in England. I have carefully considered the authorities, and I am humbly of opinion that this doctrine is entirely unknown in the law of Scotland.

With regard to the second question, it appears to me that even if maritime lien as it exists in England were recognised by the law of Scotland, this is not a case where the lien would attach. I think the doctrine in England has never yet been carried so far as to cover a case like the present.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find that the appellant and claimant M'Knight as mortgagee is entitled to be preferred to the claimant Currie: Remit the cause back to the Sheriff-Substitute to proceed therein as accords," &c.

Counsel for the Appellant—C. S. Dickson — Salvesen. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent — H. Johnston—A. S. D. Thomson. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, June 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

FERGUSON *v.* RODGER.

Right in Security—Sale by Heritable Creditor—Advertisement—Titles to Lands Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 119.

The creditor in a bond and disposition in security sold the security subjects by public roup on March 7th 1894, the first advertisement of the sale having been issued on the 26th of January preceding.

Held that the sale was invalid under section 119 of the Titles to Lands Act of 1868, in respect that a period of six weeks had not intervened between the date of the first advertisement and of the sale.

James Ferguson, creditor in a bond and disposition in security containing a power of sale in ordinary form, having failed to obtain payment of the sum due to him after making due demand upon his debtor, advertised the security subjects for sale.

The sale was advertised in the *Ardrossan and Saltcoats Herald* on six consecutive Fridays, viz.—26th January, 2nd, 9th, 16th, and 23rd February, and 2nd March 1894;