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;

and in the *Glasgow Herald* on Saturday 27th January, and the five following Wednesdays, viz.—31st January, and 7th, 14th, 21st, and 28th February.

The subjects were exposed for sale by public roup on 7th March 1894, when Hugh Rodger offered £181, and being the highest bidder was preferred as purchaser.

By article 4 of the conditions of roup the purchaser was bound to grant a bond with caution for the price within ten days of the sale, and article 5 provided that if the purchaser failed to grant such a bond with security within that time, he should, in the exposer's option, forfeit his interest in the purchase and should be liable to the exposer in a fifth part more of the price offered by him as liquidate damages for loss of market.

Rodger being called upon to grant a bond of caution in terms of article 4, declined to do so, on the ground that he had discovered that the sale had not been advertised for six weeks as required by sec. 119 of the Titles to Lands Consolidation Act, unless a clause were inserted in the bond to the effect that the purchase price would be paid in exchange for a valid disposition of the subjects. Ferguson having declined to accept a bond of caution with such a clause, Rodger consigned the price in bank. Thereafter Ferguson declared Rodger's purchase forfeited, and advertised the subjects for sale. Rodger offered at the sale but his offer was refused. The subjects were sold for £145.

Ferguson then raised an action against Rodger in the Sheriff Court at Glasgow for payment of £36, 4s. as liquidate damages for loss of market.

The defender pleaded—"(2) The defender having agreed to grant a bond of caution undertaking to pay the price in exchange for a valid disposition of the subjects, he is entitled to be assoilzied. (4) The pursuer having failed to comply with the requirements of the statute could not validly convey, and was therefore not entitled to call upon the purchaser to grant a bond for the price."

Section 119 of the Titles to Lands Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101) provides as follows:—"The import of the clauses of the form No. 1 of the said Schedule (FF) occurring in any bond and disposition in security, whether granted before or after the passing of this Act, shall be as follows, viz.— . . . The clauses reserving right of redemption and obliging the grantor to pay the expenses of assigning or discharging the security, and, on default of payment, granting power of sale, shall have the same import, and shall be in all respects as valid, effectual, and operative as if it had been in such bond and disposition in security specially provided and declared . . . that, if the grantor should fail to make payment of the sums that should be due by the personal obligation contained in the said bond and disposition in security within three months after a demand of payment intimated to the grantor, . . . then and in that case it should be lawful to and in the power of the grantee immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose in whole or in lots of the said land and others by public roup at Edinburgh or Glasgow . . . on previous advertisement stating the time and place of sale and published once weekly for at least six weeks subsequent to the expiry of the said three months in any newspaper published in Edinburgh or in Glasgow."

Upon 23rd October 1894 the Sheriff-Substitute (BALFOUR) dismissed the action as irrelevant.

Upon appeal the Sheriff (BERRY) pronounced this interlocutor:—"Finds that the defender was preferred as purchaser of the property referred to in the pleadings at the sale which took place on 7th March 1894, under articles of roup, and that he failed to carry out the purchase in terms of the articles: Finds in these circumstances and under reference to note that he is liable in payment to the pursuer of the amount concluded for: Therefore recals the interlocutor of the Sheriff-Substitute appealed against: Decerns against the defender as craved," &c.

"*Note.*— . . . It is said that as in the one case only forty days elapsed between the first advertisement and 7th March, the day of the sale, and in the other only 39 days, the requirement in the statute of advertisement 'published once weekly for at least six weeks subsequent to the expiry of the said three months' was not satisfied. I do not think this objection is valid. The requirement of the Act is not that there shall be an interval of six weeks or forty-two days between the date of the first advertisement and the sale, but that there shall be an advertisement published once in each of at least six weeks after the expiration of the three months' intimation and before the sale. That condition was complied with."

The defender appealed, and argued—The words in the clause in the Act of Parliament required that the advertisement should take place in six successive weeks, *i.e.*, six successive periods of seven days each, at the expiry of three months after the intimation to the debtor in the bond and disposition, so that forty-two days must elapse between the date of the first advertisement and the day of sale. The purpose of the clause was that the sale might be properly advertised in the interest of the debtor in the bond, and up to the last day before the sale he might come forward and pay the sum contained in the bond. The want of proper advertisement was therefore a bar to the creditor in the bond giving the purchaser at the sale a good title. There was no absolute authority on the subject, but the *dicta* were in favour of the defender—*Howard & Wyndham* v. *Richmond's Trustees*, June 20, 1890, 17 R. 990; *Nisbet* v. *Cairns*, March 12, 1864, 2 Macph. 863. Even assuming that the Court held the advertisement to be sufficient, the defender was entitled to absolvitor, because he had made a reasonable objection and not a frivolous one, and in these cir-

cumstances the pursuer ought to have considered it and tried to remove it, but he did neither, and also refused to accept a valid bond of caution when offered to him—*Howard & Wyndham* v. *Richmond's Trustees*, cited *supra*—Lord Shand's opinion p. 994.

The pursuer argued—The pursuer had opportunity to examine all the titles, &c., of the property before he offered for it at the public roup, and if anything was wrong he must bear the risk of his actings. The objection, however, was a frivolous one, as the advertisement had been properly made upon a fair reading of the statute. All that was necessary for compliance with the Act was that an advertisement should appear in each of six weeks prior to the sale; it did not infer that a term of forty-two days must expire between the date of the first advertisement and the day of sale.

At advising—

LORD JUSTICE-CLERK—Under the provisions of the statute in question it is provided that after three months' notice to the debtor have expired, and before a sale of the property, there shall be weekly advertisement for a period of six weeks. Whatever advertisement is to be given after the three months have expired, it is plain that it can be begun only after the three months have come to an end.

What happened in this case was this. An advertisement was inserted upon a certain day in the week, and five other insertions followed, the last of which was less than forty-two days after the insertion of the first advertisement, and the sale itself took place upon the fortieth day after that insertion.

It was contended that this was sufficient compliance with the provisions of the statute. I do not think so. I think that the debtor is entitled to have the advertisement for a period of six weeks before the public eye, and that only then a sale is competent. In this case the creditor did not give six weeks of advertisement.

Mr Craigie's client stated that he was doubtful if he could get a good title to the property, but it is plain that he had a *bona fide* intention to purchase the property and to carry out that purchase, and he showed his *bona fides* in the most satisfactory manner by consigning the purchase price. He was asked to sign a bond of caution, and under the articles of roup he was bound to grant a bond of caution, but the parties split upon this matter also because the defender wished to insert a clause to the effect that he would pay the price in exchange for a valid disposition of the subjects, and the other party declined to accept that. I do not know whether it would be held that the insertion of these words was essential to the preservation of his rights. I think it would not, but it is plain that the insertion could do no harm to the pursuer's rights. When the bond of caution with that clause was declined the defender consigned the money, but the pursuer declared that the sale was entirely off, and they put up the subjects again for sale.

At the adjourned sale the defender again showed his *bona fide* desire to purchase the subjects, because he again appeared and desired to bid, but he was not allowed to compete. I think the position the defender took up was one he was entitled to take, and that the pursuer is not entitled to claim from him the sum of £36 they sue for, and that the interlocutor under review must be recalled.

LORD YOUNG—I am substantially of the same opinion. I think that the defender is not in breach of contract with the pursuers and that he is not liable in the penalty which is sued for, on the ground that he is in breach of contract in not having granted a bond of caution.

I think that the sale was illegal and that it was not preceded by the proper advertisements as ordered by the statute. I think there must be an interval of six weeks between the commencement of the six weeks and the sale of the property, and it is plain that if the sale takes place within 40 days from the first advertisement there cannot be such an interval of six weeks.

Irrespective of that view I desire to say, that I think there was at least a reasonable question for the bidder at the sale to raise, and the ground of action founded on the fact that the defender had failed to grant a bond of caution must be that he had failed to grant such a bond as the one party was bound to give and the other to accept. I think that the defender here offered as good a bond as he was bound to give, and his proposal to put some superfluous words into the bond made no objection to its validity. He offered all that he was bound to offer. Upon the whole matter I agree that the defender should have absolvitor.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court sustained the appeal, recalled the interlocutor appeal against, also the interlocutor of the Sheriff-Substitute dated 23rd October 1894, and assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer—W. Campbell—Guy. Agents—Carmichael & Miller, W.S.

Counsel for the Defender—Craigie. Agents—W. & F. C. MacIvor, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, June 18.

(Before Lord Adam, Lord Kinnear, and Lord M'Laren.)

SPOWART *v.* BURR.

Justiciary Cases—Summary Prosecution—Citation — Informality — Suspension — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55) *secs.* 463 *and* 464.

In a suspension of a sentence following upon a complaint under the Burgh Police Act, *held* that, although neither