

LIENS

Lien is a right to obtain possession of another's property pending discharge of a debt. Liens are of different types.

1. Possessory lien - created by common law

Possessory lien is the right which a person has to retain possession of goods which do not belong to him until such time as certain outstanding charges which are due to him have been satisfied. Under certain situations and circumstances the possessory lien is granted by common law to certain persons. For creation of possessory lien the possession must be i) Rightful ii) Not for particular purpose and iii) continuous. Possessory lien can be a) General possessory lien - A general lien is a right to retain possession of any goods of another until all claims are satisfied. General lien exists in the case of solicitors, factors, stock brokers and bankers b) Particular possessory lien- Right to retain only the particular goods until all charges in respect of those goods have been paid. For example the carriers have a lien in respect of the freight on goods carried.

The seller of a ship may have a possessory lien for unpaid purchase money and the ship builder for the execution of repairs. The common law also grants liens to two persons i) The Ship owner - At common law the ship owner has possessory liens on the cargo for freight, for general average contributions, and for money spent in protecting the cargo. At common law the lien for freight could be enforced only by retaining the goods. The ship owner has no power to sell them in order to pay the freight. But by merchant shipping Act 1894, a power to sell the goods is conferred after they have been warehoused for ninety days and the freight and charges on them have not been tendered. In the case of perishable goods, power of sale may be exercised earlier. In addition to the ship owner's lien there is at common law a carrier's lien on the BL for his charges in respect of goods he has shipped.

A possessory lien is extinguished by loss of possession of the goods.

2. Equitable lien - created under the equitable jurisdiction of courts

The 'equitable title' or 'equitable interest' in property is that ownership which will grant on the basis of 'fairness and conscience'. Thus at times equity will hold that although one person is the owner of the legal title of property i.e the owner at law, another person should be accorded ownership rights over the property. This is normally done by means of the "Constructive trust' i.e where the court will say that the person who holds the legal title will hold part or all of the property on a constructive trust for the equitable title holder. While the lienor of a common law possessory lien, has no right of sale to satisfy his debt an

equitable lienor can enforce his right by sale of the property if its existence is confirmed by a declaration of the court. An equitable lien is however lost if it is sold to the bonafide purchaser for value without notice. This person is known as "Equity's Darling" and he is protected from the application of any equitable Interest in respect of the property he buys.

3. Statutory lien - created by Statute.

These types of liens are creation of law or statute. The Statute will provide for not only the creation of the lien but also for its application and enforcement. The enforcement refers to the power of the lienor to sell the property concerned. Tort Act under certain circumstances provides a statutory lien to the bailee of goods and Sale of Goods Act provides a statutory lien to the Unpaid Seller. A statutory lien for freight on landing goods arises in favour of a ship owner under Sec. 494 of the Merchant Shipping Act 1894. This lien once having arisen can only be discharged as set out in Sec.495 of the Act.

4. Contractual liens - Created by Contracts

At times the parties to a contract may expressly incorporate into the Contract a clause providing for a lien to rise on the occurrence of particular circumstances. The nature and extent of the lien now depends upon the contractual words which create the lien. Contractual liens are a common feature of charter parties e.g clause 21 of the Exxon voy Charter party form provides for the owner to have an absolute lien on the cargo for all freight, dead freight and costs ... and for the lien to continue after delivery of the cargo. This obviously therefore incorporates the qualities of both the common law possessory claims and equitable liens. Judicial concerns have been expressed regarding these lien clauses in the Contracts in the case of *Miramar Corporation vs Holborn Oil trading*. Such concerns have been expressed about the lien clauses in the NYPE Form.

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1. In *Miramar Maritime Corporation and Holborn Oil Trading Ltd., 1984 Appeal Cases 676*, House of Lords considered the case where the owners entered into a tanker voyage Charter Party in the standard Exxon voy 1969 form with chartereds (chartered means having royal charter or belonging to chartered body) and the Bill of Lading purported to incorporate all the terms of the charter (except the rate and payment of freight), including a demurrage clause rendering the chartereds liable for demurrage, and the owners claimed that the demurrage clause thereby incorporated into the bill rendered the consignees of the cargo, as holders of the Bill of Lading, directly liable for the demurrage incurred and held that on the true construction of the language of the Bill of Lading it was the intention of the parties to the Bill of Lading contract that the charter alone should be liable for demurrage. In that connection Lord Diplock observed:

"...I regard it, however, as more important that this House should take this opportunity of stating unequivocally that, where in a bill of lading there is included a clause which purports to incorporate the terms of a specified Charter Party which are directly germane to the shipment, carriage or delivery of goods and impose obligations upon the "chartered" under that designation, are presumed to be incorporated in the bill of lading with the substitution of (where there is a cesser clause), or inclusion in (where there is no cesser clause), the designation "charter", the designation "consignee of the cargo" or "bill of lading holder".

2. The New York Produce Exchange Time Charter (hereinafter referred to as the NYPE) was first published by the New York Produce Exchange in 1913 although, as far as can be determined, the substance of the form was in use much earlier but probably with another title.

Under the auspices of the New York Produce Exchange, the NYPE has been amended from time to time, i.e, in 1921, in 1931 and in 1946.

3. The cesser clause is a clause in a charterparty, inserted when the charterer intends to transfer to a shipper his right to have goods carried. It provides that the ship owner is to have a lien over the shipper's goods for the freight payable under the charterparty and that the charterer's liability for freight ceases on shipment of a full cargo.

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MARITIME LIEN

- i) A maritime lien may be defined as a "Privileged Claim" upon a Maritime property - a ship, or on her cargo, or on freight in respect of service done to or injury caused by them. Liens may arise for various claims, for example loss or personal injury, loss or damage to the goods, construction or repair, damage done by a ship, salvage awards etc. All claims however do not give rise to a Maritime lien. Each country would have its own standards to determine which all claims would give rise to a maritime lien. For eg. in USA ship repairer's claim would give rise to a Maritime lien where as in UK such claim would give rise only to a statutory lien and not a maritime lien. This difference in categorization came up for consideration in the case of "The Halcyon Isle" case. This case illustrates very well how a certain type of claim may carry a Maritime Lien under the laws of one country but under the laws of another country the same type of claim may not carry a maritime lien but merely a Statutory lien.

- ii) **Sec.21 (3) of the Supreme Court Act, 1981 covers the maritime liens and Sec.21 (4) covers the Statutory liens. Sec.21(4) covers liens arising due to the claims regarding loss or personal injury, loss or damage to the goods, construction or repair, damage done by a ship, salvage awards etc. As it could be seen this provision covers the items which are covered as Maritime liens under Sec.21(3) + liens arising due to other claims also. Thus a claim which attracts a maritime lien may be enforced either as a maritime or Statutory lien.**
- iii) **Following claims, constitute Maritime liens at common law and the same had been incorporated under the Sec.21(3) of SCA. They are i) Damage caused by the ship ii) Salvageiii) Seamen's Wages iv) Master's wages and disbursements v) Bottomry and Respondentia (which has become obsolete now)].**
- iv) **The essence of maritime lien was expressed concisely by the Court in the case of " The Bold Buccleugh" to be that it is a right which `travels' with the ship into whosever possession it may subsequently go. In this case the Bold Buccleugh ran down the plaintiff's vessel. Before proceedings in the Admiralty court were taken, the ship was sold to a purchaser with out notice of the incident. The Court held that the lien operated against a bonafide purchaser for value; it related back to the time when it attached. A maritime lien attaches to the property at the moment when the cause of action arises and remains attached (rather like a leech attached to the human skin), traveling with it through the changes of ownership. It is not dependant upon possession nor is it defeated or extinguished because the res may happen to be transferred to new ownership for value and w/o notice. This is the essential difference between the Maritime lien and both the possessory and the equitable lien. Maritime lien is not dependant upon the lien or being in possession of the property as is a Possessory lien. It is not lost if the property is sold to the bonafide purchaser w/o notice i.e "Equity's Darling" as is the equitable lien.**
- v) **The Whole question of liens in shipping law is bound up with the ability of the claimant to arrest a ship to satisfy the claim which gives rise to a lien. This action in rem which gives a right to arrest, proceed against and ultimately sell a ship may be exercised by the claimants of both the statutory lien and the Maritime lien. Even though both category of lien holders can bring an action in rem the significance of a claim's classification as a maritime lien is that this claim under Sec.21(3) of the SCA will attach to the `res' from the date of the claim and will be unaffected by the change in ownership. Therefore in rem, proceedings may be brought against a vessel in respect of a collision notwithstanding that it has been sold to the purchasers w/o notice of the**

claim, before the issue of the writ. However, such third parties will not be liable in personam and their liability will be limited to the value of the res. The concept of this special lien depends upon the "Personification" of the ship. We tend to think of the ship as being the "Wrong doer" and hence the justification for the lien remaining even through a change or changes of ownership. A maritime lien may be exercised only against the "primary" vessel and not against any other vessel in the same ownership. To arrest a "secondary ship" it will be necessary to rely on a statutory lien. This in rem action for a Maritime lien under Sec.21 (3) is contrast to the in rem procedure for a statutory lien under Sec.21(4) where for an in rem action to proceed the claim must arise in connection with a ship where the person who would be liable on the claim in an action in personam (the relevant person) was when the cause of action arose , the owner or charterer or in possession or in control of the ship. To that extent one might say that the Statutory lien only attaches [i.e claim gets converted to a lien] when the writ is issued and not when the claim arises -as with the maritime lien. The crux in the Statutory Claims is that the ownership should be the same at the `time of action' and at the 'time when the writ is issued' and it should not have changed.

- vi) Thus the claimant who holds a maritime lien may bring an action in rem against the ship under Sec.21 (3) even though the ownership of the `res' may have changed since the cause of action arose. The plaintiff has an unqualified right to take proceedings in rem against the ship, irrespective of ownership. But where no maritime lien has arisen in favour of the claimant his position is different if the vessel changes ownership.