

PROVIDENCE WASHINGTON INS. CO. V. WAGER *ET AL.*

*District Court, N. D. New York.*

February 28, 1888.

ADMIRALTY—PROCEEDINGS IN REM AND IN PERSONAM.

An action in admiralty *in rem* is not a bar to an action *in personam*, growing out of the same facts, and the respondent in the action *in personam* is not entitled to a stay of the proceedings pending an appeal in the action *in rem*.

In Admiralty. Libel *in personam*.

*Edward D. McCarthy*, for libelants.

*Hyland & Zabriskie*, for respondent Wager.

*Clinton & Clark*, for respondents Morse.

COXE, J. This is a motion, in an action *in personam*, by the respondent Charles E. Wager, for a stay pending an appeal to the supreme court, taken in an action *in rem*, growing out of the same facts. *The Sidney*, (Dist. Ct.,) 23 Fed. Rep. 88; *The Sidney*, (Cir. Ct.,) 27 Fed. Rep. 119. It is entirely clear that the suit *in rem* is not a bar to the present action. In view of the authorities it is, at least, doubtful whether the respondent is right in his theory that the libelants can, in the action *in rem*, by motion and amendment, obtain a decree *in personam*. But even if this can be done, it in nowise prevents them from proceeding in a separate action if they elect so to do. The weight of authority seems to sustain the proposition; that the remedy against the vessel and the remedy against the owner cannot, in Circumstances likes the present, be united or enforced in the same action; certainly no case has been cited, or found by the court, which disputes the right of a libelant to pursue them separately. *The Jessie Williamson, Jr.*, 108 U. S. 305, 2 Sup. Ct. Rep. 669; *The Sabine*, 101 U. S. 384; *The Zodiac*, 5 Fed. Rep. 220; *Insurance Co. v. Alexandre*, 16 Fed. Rep. 279, and cases cited; *Hale v. Insurance Co.*, 2 Story, 176; *Newell v. Norton*, 3 Wall. 257; Admiralty Rule 15.

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The libelants, if they have a cause of action, are entitled to enforce it. It would be most unjust to require them to await, without security, the result in the supreme court. The motion is denied.