

No 66. more bent on the trade of conquest in subduing their neighbours, and extending their dominions, than in propagating trade, and so were less concerned to encourage shipping than the mercantile nations of Europe now are. THE LORDS repelled the reasons of suspension, and sustained the Admiral's decret; and found the tradesmen who repaired the ship had a hypothec on the same till they were paid.

Fountainball, v. 2. p. 673.

1726. January 18.

Competition DAVID MAXWELL and Others, with ANDREW WARDROPEN and Others.

No 67.
The furnish-
ers for build-
ing have not
a hypothec
upon the ship.

DAVID MAXWELL and others having furnished iron, timber, and other materials, to John Adamson for building a ship; and the ship, before it was fully completed, being sold at a public roup, a competition arose upon the price betwixt these furnishers, who claimed a preference as having a legal hypothec, and John Adamson's other creditors, who had laid the first arrestment in the purchaser's hands.

It was owned by the furnishers, that we have no positive law determining any hypothec, or even privilege, in favour of furnishers for repairing or building of ships. That privilege was originally founded in the Roman law; and thereafter, for the benefit of commerce, enlarged by the trading nations, and extended to have the effect of a legal hypothec: And agreeably to that practice, furnishers for repairing of ships have always, in the Court of Admiralty, been preferred to other personal creditors. But it was *pleaded*, Though hitherto there has been no precedent, wherein the preference of furnishers for building of ships has been determined; yet if it can be made appear, 'That by the Roman law, the furnishers for building of ships were in the same case with these who repaired; 2dly, That trading nations give the same hypothec to the one as the other; and 3dly, That there is the same reason for both,' it is hoped their hypothec will be sustained, and they preferred to the creditors-arresters. As to the *first*, By the Roman law, furnishers for the use of ships, whether for building or repairing, had no legal hypothec; but they had a privileged preference among the personal creditors, *l. 34. De Reb. Auth. Jud. possid. l. 26. eod.* This privilege, competent by the Roman law, was extended by the maritime powers to a legal hypothec. See *Vinnius ad Peckium de re nautica, Tit. Ad leg. Rhod. l. Si quis ex vectoribus lit. B.* where, treating of the privilege given to furnishers for repairing of houses, which was afterwards made a legal hypothec, it is added, 'Hoc jus Accursius et plerique omnes eum secuti, ad eos etiam pertinere putant, qui in extruendam vel reficiendam, instruendamque navem pecunias crediderunt;' and several other Doctors of that opinion are there quoted. To these authori-

ties, the furnishers shall add but one other, namely, the French edict 1681; which, as it contains the ordinances and regulations to be observed in all maritime cases, collected from and adapted to the practice of other trading nations, is a strong authority in such a case. The words, as they are translated by Mr Justice, b. 1. tit. 14. art. 17. are: ' If the ship thus adjudged has never made a voyage, the carpenters, chalkers, and other artificers employed in building her, together with the creditors for the wood, ropes, and other things furnished for the ship, shall be preferred to all other creditors;' which is a regulation answering precisely to the case of the present competition. Passing now to the *third* point, The reason of introducing this hypothec, must be admitted none other, than for the interest of the commonwealth, and the benefit of commerce; therefore it is that furnishers for building of ships are entitled to it, since it cannot be pretended the repairing an old decayed ship is of so great use as the building a new one. And it were indeed unaccountable, if the trading nations, who have found it so much their interest to encourage navigation beyond what was done by the Romans, and who for that reason have given a legal hypothec to the repairer, should give less encouragement to the builder than the Romans themselves; so as even to deprive him of his ancient privilege indulged in their law.

On the other hand, it was *pleaded* for Wardroper and the other creditors, That the above citations notwithstanding, the custom of trading nations has introduced no such legal hypothec as is contended for. A master of a ship, when abroad upon foreign voyages, is allowed to hypothecate the ship for security of materials furnished for her repair. Even this was introduced *ex necessitate*, because otherwise she might perish for want of help; it being impossible that a master can have personal credit every place, where, by stress of weather, he may be forced to put in: And even here, it is still undecided, if the furnisher of materials for the reparation would have a hypothec, unless pactioned; and for this reason, masters in such circumstances are in use to grant a bill of bottomry upon the ship. But allowing a legal hypothec in this case, it will not follow, that one who has sold materials to the builder of a new ship, can plead the same privilege; for though it is of necessity that a crazy vessel be repaired, if she is to sail, there is no necessity for building a new one. Besides, when one sells to a buyer, having *larem et focum* in the place where the bargain was made, there is no sort of presumption that the goods were sold in any other than the ordinary way of merchandise, *sciz.* upon personal credit. And this leads to some specialities in the present case, that the hulk was not fully finished, and the ship never launched nor water-born. Here the general rule ought more especially to take effect: For, had she been ready to sail, it might be pleaded with some shew, what was furnished to her in that state should create a hypothec, seeing the furnisher could not trust to any diligence of arrestment, having no security that the ship would not sail the next minute; whereas, while she remained fixed upon the stocks, she was in the case of other wares, equally af-

No 67. fectable by diligence : And no solid reason can be assigned for a tacit hypothec in this case, more than in a house, for money lent to the building thereof ; and yet our practice admits of no such hypothec. This matter may be cleared from analogy of the law, in the case of a master of a ship, who being abroad prosecuting a voyage, if he borrows money upon bottomry, the owners will be liable for it to the value of the vessel ; yet he hath no power to take up money in this way at home ; if he does, he may bind himself and the share of the ship, but the owners will not be liable.

This hypothec given to repairers, can be founded in nothing but the necessity of the thing, which excludes the builder : For if the advantages to commerce were the determining rule, which is urged on the other side, this is so far from giving a hypothec to the builder, that it would exclude all hypothecs, being so many impediments to free commerce. It is remarkable what Averanius, a famous Italian lawyer, says on this head, p. 460. of his *Interpretationes Juris* : ‘ Observandum enim est, (says he,) quod si naves tacite pignori obligentur omnibus, qui vel ad naves fabricandas, vel reficiendas, vel armandas, vel emenda nautis cibaria, pecuniam crediderunt, facile eveniet ut a creditoribus detineantur ; atque ideo libere navigare non poterunt commercii causa, ac maximum mercaturæ afferetur impedimentum.’ Taking the matter in this light ; if we consider the genius of the law of Scotland, it will be still more in Mr Wardroper’s favour. Time and experience, the great reformers of laws, have taught us, that most part of the conventional and tacit hypothecs, introduced by the common law, were a burdensome nuisance, of great hindrance to commerce ; and therefore justly rejected, especially in the subject of moveables, there being no records to ascertain purchasers of their danger : For which reason, we have a general practice to disallow of all sorts of hypothecs, without delivery of the thing impignorated ; which excludes the furnisher of materials for building a ship, and would exclude the repairer also, were it not the necessity of the thing that preponderates on the other side.

‘ THE LORDS found, That the ship having been sold by public roup, in a process against the builder, before he had fully finished her, and that she was never launched or water-born, the furnishers of materials to the said incomplete ship, have no legal hypothec thereon ; and therefore preferred Andrew Wardroper on the price of the bark libelled, to the furnishers.’

Fol. Dic. v. 1. p. 419. Rem. Dec. v. 1. No 68. p. 133.

No 68.
Furnishers for
the repairs of
a ship found
to have a
hypothec
upon the ship
for repay-
ment.

1761. March 4.

The ROPE-WORK COMPANY of Port-Glasgow, against MESSRS CROSSES.

CAPTAIN DUNLOP, master of a ship belonging to Mathew Bogle, which was going to Virginia, got repairs of ropes made upon her at Port-Glasgow before she sailed, to the amount of about L. 90 Sterling.