

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. 1761. March 4.

Furnishers for the repairs of a ship found to have a hypothec upon the ship for repayment.

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.

In a competition among Mathew Bogle's creditors for the value of this ship, which had been sold, and the price of which was in a trustee's hands, the Rope-Work Company, furnishers of the ropes, *insisted*, That they had a hypothec on the ship, and a preference on the price before Mr Bogle's other creditors.

No 68.

*Answered, 1mo*, A ship cannot be hypothecated, except by the express paction of the master; there is no implied hypothec upon ships. *2dly*, The master cannot hypothecate the ship for repairs, even by express paction, except in a foreign port; and this he is allowed to do, only from the necessity of giving him such a power, as without it he would get no credit for her repairs.

' THE LORDS found the Rope-Work Company preferable.'

Act. *Lockhart, Ferguson.*  
J. M.

Alt. *Miller, Jo. Dalrymple.*  
Fol. Dic. v. 3. p. 296. Fac. Col. No 28. p. 56.

Clerk, *Home.*

1788. July 29. ARCHIBALD HAMILTON *against* JOHN WOOD and Others.

In a competition of creditors, Wood, and other persons, by whom a ship belonging to the bankrupt had been repaired in a home-port, claimed a right of hypothec, as thence arising on the ship itself. To this claim, Hamilton, the trustee of the creditors at large, objected; and

No 69.  
Hypothec does not take place on ships for repairs made in home ports.

*Pleaded*, There is nothing in the situation of persons who furnish labour or materials for the repairing of a ship, to create a right of hypothec, more than in that of all those who perform any other work, or provide any other materials. The contract of sale takes place as to the one, and of *locatio conductio* as to the other; but in neither does any real right remain in the creditor after delivery of the subject. The Roman law admitted a great number of tacit hypothecs, which are altogether rejected in ours; yet among these, the hypothec now claimed had no place. They who lent money for building or repairing, or even buying a ship, had indeed by it a privilege beyond other creditors, but no right of hypothec; l. 26. *D. De reb. auct. jud. poss.* To the genius of our law, all tacit hypothecs are adverse. Balfour, employing the words of the *Regiam Majestatem*, states it as a rule, "That without delivery there can be no impignoration; Pract. p. 194. Nor, in any of the more early writers is there the least intimation of the right now claimed. When Lord Stair (b. 1. tit. 12. § 18) mentions the hypothecating of a ship "for what was borrowed for the use of the ship's company or voyage," he must necessarily refer to a special contract of hypothec by the master; for a tacit hypothec to such an extent never existed any where. As the right in question, then, results not from the nature of the contract to which it relates, so it is as unknown in the common as in the statute law; for it is in vain to talk of a common-law right which was unheard of at the end of the last century.

In the case of *Gay contra Arbuckle*, 16th November 1711, No 66. p. 6262, it seems indeed, at first view, as if the Court had recognised this tacit hypo-