

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.

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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

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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-

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thec to the extent insisted on; but when its peculiar circumstances are examined, they will be found not necessarily to involve that conclusion; which, however, appears better warranted by the decision in the later case of the Rope-work Company of Glasgow *contra* Crosses, 4th March 1761, No 68. p. 6268. The admiralty-court, too, in several instances during the present century, have given their sanction to the claim now in dispute; but those judgments were combined with others manifestly erroneous and illegal. Nor will the decisions of that court, in whatever series, constitute the law. That is the prerogative of this supreme Court. Yet even here, if not only a single one, but a course of decisions, have proceeded on an erroneous principle, there is nothing to prevent the error from being corrected by a subsequent determination. Of this the decision Keith *contra* Keith, 17th February 1688, *voce* PRIVILEGED DEBT, affords a remarkable example, by which the Court altered what had been determined by a number of preceding judgments, then finding, that a wife was not a privileged creditor for implement of provisions in her marriage contract.

It is true, that in foreign voyages, the right of hypothec may be necessary to induce strangers to furnish the repairs which are wanted; but with respect to a home-port, as in the present instance, no such necessity can be pleaded to justify a claim so evidently adverse to the interests of commerce. This distinction is established in the law of England, which deserves peculiar regard, as that of the first commercial country in the world.

Answered, It has been admitted, that the hypothec in question exists for repairs made in a foreign port; and it is plain, that the *lien* created by bonds of bottomry, is equally latent as any right of hypothec can be. The argument, then, from expediency, is defective; because no new inconvenience can be attributed to the present claim. The law of Scotland makes not any distinction, on the subject of hypothec, between foreign and home-ports, more than did that of the Romans respecting their *privilegia*. No such distinction is to be traced in any of our earlier writers on the law; and Mr Erskine, the latest of them, lays down the rule in general, "That the repairers of a ship have a hypothec upon it, in security of the expense of reparation." The corresponding practice and sense of the nation are evinced by the uniform decisions of the admiralty-court, downward from 1704, sustaining the right in question, whether relative to the ports of this part of the united kingdom, or those abroad; decisions which, though not so authoritative as if they had been pronounced by this Court serve equally to shew the general acquiescence of the country. The decisions of this Court also, during the course of a century, confirm the same doctrine; for example, in the case of Gay and others *contra* Arbuckle, in 1711, No 66. p. 6262, and of the Rope-work Company of Glasgow *contra* Crosses, in 1761, No. 68. p. 6268. It is difficult to conceive, then, by what other means the point could have been better established

in the common law of Scotland. And being so fixed, no reason can be assigned why it ought to be overturned. Were its conformity to the general commercial law of Europe to be deemed a criterion, it could not be overthrown, since, England excepted, the right of hypothec to the extent now claimed seems to be recognised by all the trading states; and in Holland, in particular, it is undoubtedly admitted. At the same time, it is evident, from what has been already stated, that this question never can arise in our courts, but between Scotsmen, with respect to furnishings made at a home-port.

The Lord Ordinary sustained the claim of hypothec. But

The Court, on advising a reclaiming petition against that interlocutor, with answers, as also a case transmitted for the opinion of English counsel, with the opinion, stating the law and practice of England thereon, found, That Wood and the other furnishers had no hypothec or right of bottomry on the ship in question.

And to this judgment, after an intermediate contrary one, the Court finally adhered by two successive interlocutors.

N. B. The Court, at the same time, decided in like manner a similar question between John Syme, and Reynold Pohl in the right of Gavin Kempt.

Lord Ordinary, *Braxfield*.

For Hamilton, *Rolland, Blair, Ross*.

Alt. Dean of Faculty, *M'Cormick*.

Clerk, *Menzies*.

Fol. Dic. v. 3. p. 296. Fac. Col. No 40. p. 65.

* * * This cause was appealed.

THE HOUSE OF LORDS, 15th June 1789, " ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of, confirmed.

SECT. IX.

Whether Hypothec affected by Sequestration upon the Statutes relative to Bankruptcy.

1772. November 24.

HENRY BAIRD, Tacksman of Egypt, and HUGH FRASER, Factor appointed by the Court of Session on the Sequestrated Estate of the said HENRY BAIRD, against THOMAS BROWN, late Proprietor, and CHARLES GORDON, Writer to the Signet, now Proprietor of the Estate of Braid.

THIS being a question that turned upon the interpretation of the late statute, in a case where, subsequent to a sequestration of a tenant's personal es-

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Sequestration
awarded up-
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