

The Lord Ordinary reported the cause on informations.

THE COURT, 5th June 1793, sustained the claim of retention.

On advising a reclaiming petition and answers, it was

Observed on the Bench; Mr Jollie, whether considered as a mandatary or trustee, is not bound to denude till relieved of his cautionary obligations. In the case, Harper against Faulds, the goods were put into the hands of an artificer, merely to perform a certain operation upon them, under an implied obligation to restore them whenever it was finished, upon receiving the price of his labour. It was therefore thought, that he could not be entitled to hold them as a pledge or security for debt in general; but it was admitted, that cautioners, factors, or trustees, stood upon a different footing.

THE COURT unanimously 'adhered to the interlocutor reclaimed against, in so far as it sustained the claim of retention maintained for James Jollie, reserving to the parties to be heard how far individual tradesmen, creditors of the said John Brough, had a right to insist against Mr Jollie for payment of work done, or materials furnished by them to the subjects in question, and also reserving to the creditors at large to insist against him for repayment of the original purchase-money of the area, without prejudice to any defences competent to him against these claims.'

Lord Ordinary, *Dregborn.*

For the Objectors, *Solicitor-General Blair, Patison.*

For Jollie, *Dean of Faculty Erskine, Cullen.*

Clerk, *Mitchelson.*

R. D.

Fol. Dic. v. 3. p. 143. Fac. Col. No 75. p. 166.

1794. *January 16.*

JOHN GLASS *against* The TRUSTEES for the CREDITORS of Charles Hutton.

CHARLES HUTTON, shipmaster in Culross, in consequence of a commission from John Glass, merchant at Stirling, purchased a vessel at Bergen in Norway, for their joint behoof.

John Glass advanced to Hutton a considerable sum more than his own half of the original price and expense of fitting out the vessel from that port. The vessel brought home a cargo, in which Hutton had no interest. A settlement afterwards took place between him and Glass, and a bill was granted for the balance due by the former; and it was agreed, that upon payment of it, they should have equal right to the ship.

Glass likewise paid a farther sum for repairs made on the vessel after the voyage.

Hutton became bankrupt while the vessel was lying at Culross.

The Trustees for his Creditors agreed, that the property of the ship should be wholly transferred to Glass, at an appreciated value, which he became bound to make furthcoming to those who should be found to have best right to it.

No 41.

No 42.

A joint owner of a ship has a claim of preference or retention on it, for money advanced by him on its account, to the other proprietors, above his own share.

No 42.

He accordingly raised a multiple-pounding against the Trustees, in which it was early established that he was entitled to retain one half of the value on his own account. He farther claimed a preference on the other half, *inter alia*, for the balance mentioned in the settlement, and for the furnishings made after the voyage; and

Pleaded; As the object of the parties, in purchasing the ship, was to earn profit by freights, and as the employment of it required skill, and was attended with risk, the connection between them came under the description of a joint adventure, just as much as if Hutton had had a share in the cargo. Each, therefore, had a preference on the stock over the private creditors of the other, for relief of the engagements he had undertaken on its account; Ersk. b. 3. tit. 3. § 29. Each was proprietor *pro indiviso* of the common subject; and as he was personally liable for the whole charges attending it, the creditors of the other cannot insist in an action *communi dividendo*, without relieving him of one half of them.

Answered: Since the pursuer did not provide for his own security by a bill of bottomry or otherwise, he must be understood to have made the advances in question upon the personal credit of Hutton; and he has no more a real right in the ship, than if he had advanced money to him for the purchase of plate or household-furniture, he would have had upon these articles. If the money had been lent to Hutton, to enable him to purchase a ship solely for his own behoof, the pursuer would have had no preference upon it; and there seems no reason why he should in the present case be in a better situation.

The creditors of a company, or joint adventure, are preferable on the stock to the private creditors of the partners; because it is in law held to belong to the company itself, and not to the persons engaged, whose right is confined to a personal *jus crediti* against it. But this is not a case of joint adventure. Each had a real right in the ship to the extent of a half, and they were in the same situation with regard to each other, as the joint owners of any other subject, whether heritable or moveable.

Further, the pursuer has no claim of retention; because he cannot be held to have had possession of more than his own share of the ship. Hutton might certainly have disposed of his half at pleasure, and therefore he must have had power to transfer the possession of it to a purchaser.

The Lord Ordinary repelled the claim of preference.

But, upon advising a reclaiming petition and answers, THE LORDS, influenced both by the merits of the case, and the decision 16th June 1790, Roxburgh against Greig*, unanimously found Glass entitled to 'a preference for the outlays and expense bestowed by him on the ship.'

Lord Ordinary, *Henderland*. Act. *Maconochie*. Alt. *Hay, Fletcher*. Clerk, *Colquhoun*.
D. D. *Fol. Dic. v. 3. p. 146. Fac. Col. No 92. p. 204.*

* Not reported. See APPENDIX.