

No 65.

imported without a charter-party (as in this case) are still liable for the seamen's wages; which is founded on material equity, in regard the seamen take the goods aboard, place them where they may be safest, and are liable for any damage arising to them in the ship, without extraordinary stress of weather; they navigate the ship, bring her to the designed port, and deliver out the goods safe. The seamen did indeed suffer the goods to be unloaded before they craved their wages, because they thought they were dealing with an honest man, who would not defraud them; and they could not claim wages till after delivery of the goods. But after all, though the cargo were not affectable for the seamen's wages, the suspender *qua* merchant cannot refuse to pay them, seeing he still owes the freight to the skipper.

THE LORDS were clear that the seamen's wages were no debt of bottomry affecting either the keel of the ship or the cargo; but found the freight liable for the said wages, and therefore repelled the reason of suspension.

Fol. Dic. v. 1. p. 420. Forbes, p. 219.

1711. Nov. 16.

ALEXANDER WATSON carpenter, JOHN GAY and Others, *against* WILLIAM ARBUCKLE, Merchant in Glasgow.

No 66.

A right of hypothec found competent to the repairer of a ship for his expenses in refitting her. The owner here found liable also personally for the repairs, because he had loosed the repairer's arrestment of the ship on caution, and carried her off to prosecute a voyage after the loosing.

WILLIAM ARBUCKLE, who purchased the ship *The Caledonia* at a public roup, did, in pursuance of a contract betwixt him and Captain Breholt, order, by a commission under his hand, the apparrelling and pertinents of the ship to be delivered to Breholt, for caulking and refitting her for an intended voyage; and thereafter went with him and communed with Alexander Watson, a carpenter, about repairing the ship; in prosecution of which communing, Alexander Watson and others, having expended in workmanship and furnishing to the value of one hundred and eighty-four pounds four shillings and three pence Sterling, pursued Arbuckle for payment, before the High Court of Admiralty; and, upon the dependence of the process, arrested the ship. Arbuckle loosed the arrestment upon caution, and sent off the ship to prosecute some voyage. The Judge found the pursuers had a right of hypothec upon the ship, for payment of their expenses in refitting her, and that the defender was liable to them as he who loosed the arrestment, and intromitted with, and carried off the ship after the loosing, and decerned.

Arbuckle raised suspension and reduction of the Admiral's decret, upon iniquity; in so far as, *1st*, There is no foundation in our law for a tacit hypothec in favour of repairers of ships; and the civil law allows them only a personal privilege, *inter creditores Cbyrographarios* L. 26. § 34. *D. De Rebus Aut. Jud. Possid.* The Title *D. In quibus Causis Pignus vel Hypotheca tacite contrahitur* (where all the tacit hypothecs are fully enumerated) mentions no hypothec in

favour of one who expends in the repairing ships, and *Casus omissus habetur pro omissis*: Yea, it were out of measure hard, to alienate any person's property without his consent, where the law is silent; nor is the reason for indulging this privilege to a creditor *in domum reficiendam*, viz. *ne aspectus urbis deformetur ruinis*, applicable to the repairer of a ship. 2do, A hypothec being only an accessory security, requires and supposes a principal obligation, to which it is accessory; and when *principalis causa non consistit, nec ea quæ sequuntur locum habent*. In the Roman law, the hypothec did not take place in favour of *Redemptor operis*, who advanced money to any person *ad reficiendas ædes*, unless the same was done *mandante domino*, L. 1. D. *In quib. Caus. Pign. & Hyp. Tacit. Voet Comment ibid N. 28*. Now, it is not pretended that Breholt was proprietor of the ship; and Arbuckle's order to deliver to him the materials and utensils, in order to refit the ship, cannot import a mandate to him for repairing her, or contracting with other persons about the reparation upon Arbuckle's account; besides, the Admiral's decret doth not proceed upon any such mandate, but upon the suspender's being intromitter with the ship that was hypothecated to the chargers for their expenses and reparations.

Replied for the chargers; 1st, The legal hypothec in this case may be pleaded from the reason of the L. 6. D. *Qui potior. in pig. Salvam enim fecere totius pignoris causam*; and from the parallel uncontroverted hypothec given to the repairers of houses. Though the Roman law be not express for us, the custom of Scotland and other trading nations in Europe is: So, by the Scottish law, mariners have a tacit hypothec upon the ship and freight for their wages; a skipper has a tacit hypothec upon the goods for his freight. *Voet Comment. Tit. D. In Quib. Caus. Pign. Tacit. N. 29*. And Simon Van Lewen tells us, That *usu hodierno illis qui in navis refectionem crediderunt, hypotheca competit in ipsam navem*. Now, the true rule to regulate such matters is the *jus gentium* collected from the concurring testimonies of famed lawyers. 2do, By the practice of this and other trading places, if money be lent for repairing a ship affected with an express hypothec, as a bill of bottomry, or, which is more favourable, if she be repaired by tradesmen, the lender or repairer is preferred to the bottomry, if the borrower or employer had but the temporary direction of the ship, whether he was truly owner or not; for if, when a ship needs to be repaired, in order to a voyage, workmen should be obliged to enquire narrowly into the title of the overseer of the ship (which often is not, and cannot be at hand), ships should either fail for want of reparation, or the voyage be defeated through their not being timely refitted, which would prove ruinous to trade and navigation; upon which account, many privileges are indulged to ships and seafaring men, *præter juris communis regulas*. In this case, beside the general ground of law, there occur many circumstances of consent to the repairing and ratihabition, that *per se* might be pleaded as obligatory upon the suspender, *actione mandati*, or *exercitoria*.

No 66.

Duplied, for the suspender ; The civil law, which allowed no hypothec to the repairer of ships (and not the constitutions of Holland or other countries) ought to be our rule, in cases where our own law is silent ; and, as the supreme Courts of Holland, Flanders, and Savoy, followed the disposition of the Roman law, till a contrary law was made among themselves in this matter ; so before such an extension of the *jus hypothecæ tacitæ* can obtain in Scotland, a particular law for that effect is necessary.

THE LORDS repelled the reasons of suspension and reduction, and found the letters orderly proceeded.

Fol. Dic. v. 1. p. 419. Forbes, p. 539.

. Fountainhall reports the same case.

THE famous ship *Caledonia*, built for our trade to the colony of Darien, being exposed to roup, was, in 1707, bought by William Arbuckle, merchant in Glasgow, who afterwards entered into a contract with Captain Breholt, a stranger trader, whereby he sells him the said ship for L. 2500 Sterling ; but in case of not payment at the day fixed, there is a resolute irritant clause, that the property of the ship shall return to Arbuckle again. But in regard Breholt intended to fit her out immediately for a voyage to sea, he craved liberty immediately to repair her, and declared it should be on his own expenses ; and accordingly he employed one Watson, a ship-carpenter, with Gay, Crawford, and sundry others, to equip, caulk, and refit the same ; who having repaired it, and furnished sundry materials thereto, and being put at to pay the price to Arbuckle, and the value of the reparations to the several tradesmen, he fled and retired out of the kingdom ; whereby Arbuckle, by his conditional sale, gets back his own ship again ; and the tradesmen, disappointed of their wages, raise a process against Arbuckle, before the High Admiral, for payment of their reparations, on this ground, that the ship stood in law hypothecated for their payment ; besides, that he was present when Breholt employed them, and gave a commission to one Vanse to deliver up what apparrelling he had belonging to the said ship. And the Admiral, having admitted the furnishing and value of the reparations, and the necessity of them, to probation, he found the same sufficiently proved, and that the repairers had a right of hypothec on the ship for payment of what they had expended to refit her for the voyage ; and that he, as proprietor of the ship, was personally liable to pay the same. Arbuckle thinking himself grieved, procures a suspension of this Admiral decret, and, at discussing, insisted on these reasons : *1mo*, You bargained allennarly with Breholt, and his faith you followed, who was then looked upon as an opulent merchant, though shortly after he fled and broke. I made no bargain with you, but, on the contrary, secured myself in my contract of vendition, that he should be at the sole expense ; and I was to be altogether free, so you must go to your employer ; and my presence, when he spoke to the carpenters and others, were a rare passive title to make me any more liable than others present,

as well as me. *2do*, In so far as the ship was truly meliorated, I should not much reclaim, being *in rem versum*; but then you must first instruct her condition before, and if she stood in need of reparations, and how far they were profitable and necessary; whereas in the account, there be several idle and voluptuary articles, such as gilding and painting, for which he can never be liable. *3tio*, The Admiral committed gross iniquity in finding the ship hypothecated for these expenses, whereas neither the Roman law nor ours have any such hypothec; for it is clear, *per l. 26. § 34. D. De reb. auctoritate jud. poss.* that the creditors *in extruenda vel instruenda nave* have only a personal privilege next after the fisk, and so preferable to the *creditores chirographarii*, but have no hypothec. And in all the title *In quib. caus. pignus vel hypotheca contrah.* amongst all the hypothecs enumerated there is no mention of that of a ship, *et casus omissus habendus pro omissis ex industria*; and it were unjust to burden his property, where the law is silent; and the Doctors generally deny it a real privilege, but only personal; as Bachovius *de pignoribus*, Struvius, Zoesius, and, above all, Vinnius, *select. quæst. lib. 2. cap. 4.* proves there is no hypothec in this case, unless it be expressly stipulated, which is not pretended here. *Answered* for the carpenters and others, repairers and furnishers of the ship, We knew nothing of the latent contract betwixt you and Breholt; we esteemed you as *dominus* of the ship, and saw you interest yourself in the reparations. as your commission proves; and *utcumque* whoever was *dominus*, we esteemed ourselves safe as long as the ship lasted, it being our legal pledge; and *esto* the common law has not reckoned this among other tacit hypothecs, yet it comes very near it; for *l. 5. D. Qui pot. in pign.* says expressly, *interdum posterior potior est priori, veluti si navis fuerit obligata, et ego ad armandam vel reficiendam eam pecuniam credidero*, and then assigns the plain reason for it, in *l. 6. eod. hujus enim pecunia salvam fecit totius pignoris causam*. So that, if a ship were affected with an express hypothec of a bill of bottomry, yet he who repairs it, or lends money for it, will be preferred, because he preserves the subject from perishing. And *l. 1. D. In quib. caus. pignus vel. hyp. contrah.* and Justinian *Novel 97. cap. 3.* seem to own a tacit hypothec in such cases. And in the repairing a ruinous house, it is allowed by the Roman law, *ergo multo magis* in a ruinous ship; and seeing our law gives mariners and the crew a tacit hypothec on the ship and freight for their wages, and the skipper and exercitor has the like on his goods for his freight, why should not the repairer by the same rule have an hypothec for his expenses? And the learned Voet, *ad tit. In quib. caus. pignus, &c.* puts it out of controversy; for he tells us, by the laws and customs of Holland and all trading nations now, the ship is hypothecated for its reparations, because trade brings in money, the *nervus belli et magnum firmandorum imperiorum adjumentum*, and adduces Grotius, Mattheus *de Auctionibus*, and Simon Van Leuven, who argues, that the *ratio finalis et dispositiva* introducing an hypothec on a house holds *multo magis* in a ship. And yet with us a mason, wright, or other builder of a house has no hypothec on it for the price. And as to the Romans, they were

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-