

1789.

[M. 6269.]

WOOD, &c.  
v.  
HAMILTON.

MESSRS. JOHN WOOD & Company, Ship-  
builders in Port Glasgow, MESSRS. BROWN  
& Company of the Saltcoats Rope  
Work, & Others, } *Appellants;*

ARCHIBALD HAMILTON, Trustee on the Se-  
questrated estate of JAMES & PATRICK  
HUNTER, Merchants, Port Glasgow, } *Respondent.*

House of Lords, 15th June 1789.

**BOTTOMRY—HYPOTHEC.**—Hypothec does not attach for repairs  
executed while the ship is in a home port.

Nov. 24, 1784. Of this date, James and Patrick Hunter, merchants in Port  
Glasgow, were sequestrated, and, under the bankrupt act,  
the respondent was appointed their trustee.

Among their effects was a ship of the name of Rebecca,  
then lying in harbour at Port Glasgow, upon which the ap-  
pellants had sometime previously executed considerable re-  
pairs, and some of the appellants were actually repairing  
the vessel at the date of the sequestration. The question  
was, Whether they had a preferable right or hypothec or lien  
over the ship for the amount of the repairs?

Jan. 24, 1787. The Lord Ordinary sustained their claim of hypothec, but,  
on a reclaiming petition to the Court, it was contended, 1st.  
That there was no hypothec, when the furnishings are made  
on contract with the owner; 2d. That the tacit hypothec, or  
bottomry right, extends only to repairs executed in foreign  
port, and only *for the last voyage*, unless constituted by bill  
or bond of bottomry; 3d. That if any hypothec lay here, it  
could only be for the last furnishings made to the Rebecca  
at the date of the sequestration, and not for old repairs.

Dec. 12, 1787. The Court ordered the opinion of English counsel to as-  
certain the practice of England in such cases; upon con-  
sidering which; they found “ That the respondents (appel-  
lants) have no hypothec, or right of bottomry on the ship  
“ in question.” By a subsequent interlocutor, on reclaiming  
petition, the Court found, “ that the respondents (appellants)  
July 29, 1788. “ have no hypothec or right of bottomry on the ship. in  
“ question.” Another reclaiming petition was presented,  
contending for the appellants:—That there was no distinc-

tion between home and foreign repairs, and, consequently, it made no difference, whether the master or owner contracted for the furnishing, or whether these were furnished in the home port where the owner resided. The respondent insisted that there was a solid distinction between home and foreign repairs, the privilege of hypothec attaching only in the latter case; and that, by the law of England, a tradesman who repairs or furnishes materials for a ship, the owner of which resides in England, does not acquire any lien upon the ship, but is a mere personal creditor: The same law must apply here. It was replied, that this question must be tried by the principles of the law of Scotland, as the *lex loci contractus*; and these principles being clear, according to the decisions in favour of the appellants, there was no occasion to resort to that law; and therefore their hypothec attached.

The Court adhered; but remitted “to the Lord Ordinary Feb. 24, 1789. “to hear parties on the right of retention claimed by the “petitioners John Wood & Co.”

Against these interlocutors, in so far as they found that the appellants have no hypothec or right of bottomry on the ship in question, they brought the present appeal.

*Pleaded for the Appellants.*—1. The right of hypothec in favour of the repairers and furnishers of a ship, is founded on the Roman law, recognized and observed in most nations of Europe, and is now, and has been the law of Scotland from an early period. And in determining such questions in Scotland, the practice has always been, to allow of such hypothec for repairs, without making any distinction, whether the same were made in a home or a foreign port; 2d. But, separately, whatever be the law of England, it is clear that the present question must be determined by the law of Scotland, as that law stands recognized, acted upon, and confirmed by the universal understanding of the kingdom; and they further maintain that the distinction now set up between repairs and furnishings in a foreign and home port, has never been until now heard of in that law.

*Pleaded for the Respondent.*—1st. The right of hypothec upon a ship for repairs, to the person repairing or furnishing the vessel at a home port in Scotland, on the order of the owners residing at that port, is not recognized by any writer on the law of Scotland. It is only when the vessel is in a foreign port that such a claim arises, and where the master of the vessel may hypothecate the vessel for repairs; but as to

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work at home, it is held as executed upon the personal credit of the owner alone, and not upon the security of the ship. 2d. What has been found to be expedient and advantageous to the commercial law of England, cannot be hurtful to the commerce of Scotland; and as the commercial law of the two countries acknowledges the same origin, the rules of the one must apply to the other.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *T. Erskine, W. Grant.*

For Respondent, *Ilay Campbell, Alex. Wight.*

PATRICK CRAWFORD BRUCE, and PHILIP  
 SAMUEL MAISTER, Esqs., Executors of  
 the deceased CHARLES STEWART, and  
 ALEXANDER DUNCAN, their Attorney, } *Appellants;*  
 JAMES STEWART, Sheriff-Substitute of  
 Kinross, and GEORGE GRAHAM and  
 Others, his Trustees, . . . } *Respondents.*

House of Lords, 3d March 1790.

SUCCESSION—GIFT.—A party had made his will in India, appointing executors in this country to execute the same after his decease. Previous to his death, he had expressed a desire to remit a certain sum, £1000 to his father, by a friend who was intending soon to return to this country, and whom he wished to take home the money to his father. This friend ultimately got the sum to take home for that purpose, but accounts of the donor's death reached England before delivery of the money. In this case, the executors under the will claimed the same; Held that the father was entitled to the money, the gift being absolute and complete during the life of the donor.

Charles Stewart had, for several years prior to 1783, been settled at Bombay, in the Civil Service of the East India Company. Having a prospect of bettering his fortune, from being appointed paymaster to the army then proceeding against Tippu Saib, he made his will, leaving and bequeathing the whole he might be possessed of, to and for the use of his two infant natural children, and appointed the appellants as his executors.