

No 43.

the product of their fishing ; and if it were otherways, that the heritors of salmon fishings should not have that privilege, then the tacksmen might sell and put away the fishes, and so render all salmon fishing altogether useless and unprofitable ; and where a party has right by tacit hypothecation, it is not taken away by selling of the subject, in a public market, because the effect of tacit hypothecation is, that it makes it to be the party's own, without tradition or delivery ; so that a tenant's selling the product of the ground, fishing, or others, can no more prejudice his master of his right of tacit hypothecation, &c. to a year's rent, than if he were selling his master's goods in a public market, *quia jus pignoris sive hypothecæ ita rei annexum est, ut debitor nec rem alienando neque alteri postea obligando possit creditore aufere* ; Leg. 15. Cod. De pignor hypothec. Perez. in lib. 8. Cod. Tit. 18. No 9. ; and which is clear by several decisions in our law, and particularly Hay against Elliot, No 26. p. 6219., where the buyers of corn in public market, were found liable to the heritor for a year's rent, upon the account and privilege of tacit hypothecation. And the 4th July 1667, Cuming of Altyr against Lumisden, No 40. p. 6237., where, in the case of a salmon fishing, the Lords found the donatar of the tenant's escheat liable to the master for the tack-duty, by virtue of the tacit hypothecation. THE LORDS repelled the reason of suspension ; and found the heritor hath an hypothec in the fish for his yearly rent ; and therefore assoilzied from the reduction, and found the letters orderly proceeded.

Sir P. Home, MS. v. 2. No 875.

1723. November.

CUNNISON against SOMERVILLE.

No 44.

THE British statute, 8vo *Annæ*, entitled ' An act for the better securing of rents, and to prevent frauds committed by tenants,' was found not to extend to Scotland. See APPENDIX.

Fol. Dic. v. 1. p. 419.

1735. December 3.

THOMAS LOWRIE, and the other CREDITORS of David Maclellan, against JAMES BURNS, Assignee to certain Journeyman Wrights.

No 45.

Workmen have no real right or preference to other creditors, on account of their reparations done to a house.

DAVID MACLELAN, proprietor of a house at the head of the Cowgate, employed some journeymen wrights to repair it, and thereafter he disposed the same, under reversion, to the said Thomas Lowrie ; in which he was infeft, for relief of some obligations in which he was engaged as cautioner with him. Maclelan having soon thereafter failed in his circumstances, his creditors adjudged, and, among the rest, these journeymen wrights for some wages due to them. In a ranking of the creditors, James Burns, as assignee to the journeymen, craved to be preferred on the said tenement. And the topics upon which he

founded the preference, were, that the subject was meliorated by their labour ; consequently they should be preferable for their wages both to Lowrie and the other adjudgers, seeing the repairs were *in rem versum* of the creditors ; as they could have no fund or hope of payment, if the house had been allowed to go into disrepair. As therefore the other creditors are *locupletiores* by their labour, it is but agreeable to the principles of justice and equity, that they should be preferred, conform to *L. 1.* and *L. 3. § 2. D. De in rem vers.* Stair, B. 1. tit. 8. § 6. and 7. Neither ought it to make any difference, that Maclelan was their employer, seeing the subject itself was disposed to Lowrie during the time they wrought ; so that it was properly work wrought for his behoof. Thus, in the case of a master-mason or wright employing journeymen in a piece of work he had undertaken, the journeymen would have action both against their employer and against the proprietor. In the *second* place, it was *pleaded*, That Lowrie having obtained a warrant from the Dean of Guild court to repair part of the house, and for which repairs he was preferable to the other creditors, of consequence they should be preferable to him, as having made these reparations, which he as proprietor might have been decerned to make by the 6th act, Parl. 1. sess. 3, Cha. II. And if he were preferable to Lowrie, who had an heritable right to the subject, of course they behoved to be preferable to the other creditors.

On the other hand it was *argued* for Lowrie, &c. That the work's being profitable for them, can create no preference to real creditors upon an heritable subject ; seeing that would resolve into a tacit hypothec, which the law reprobates. Nay, even supposing they had lent money, or furnished materials wherewith the house was built, it could afford them no preference thereon by the law of Scotland ; and, if the civil law were to have any influence, it could not vary the argument, as it gives no privilege to workmen on a building for their work. Besides, if it were to take place in this case, several of the creditors, who lent their money to Maclelan, to pay the tradesmen, would be preferable to these journeymen. But, in respect that hypothecs were extended by the Roman law further than is agreeable to our practice, therefore they have not claimed any preference on that account. And, if tradesmen had a preference upon a house for their wages, a purchaser might be liable to pay the price a second time, if any of the workmen chanced not to be paid up.

As to the pretence, that the reparations are *in rem versum*, that can only be the ground of a personal action against the employer, but cannot affect singular successors, or afford any real right on the subject.

To the *second* ground of preference, it was *answered*, That the reason why repairs made in a house, in virtue of the Dean of Guild's warrant, have a legal preference, is founded on a presumed contraction betwixt the Dean of Guild and the repairer, that he shall have a pledge for his reimbursement : An expedient introduced into our law, *ne urbs ruina deformetur*, but that can noways

No 45. avail the journeymen, who wrought upon the faith of Maclelan, without relying on the subject.

THE LORDS preferred Lowrie to the journeymen.

C. Home, No 3. p. 11.

1758. *January 13.*

JAMES DONALDSON *against* JOHN GRANT, and OTHERS, Creditors of ALEXANDER REID.

No 46.
Preference given to a creditor who built or repaired a house, in virtue of a jedge and warrant.

UPON the 2d of February 1726, Donaldson's father applied to the Dean of Guild court of Edinburgh, setting forth, 'That he had right to part of a tenement of houses on the west of Liberton's wynd head, which had received damage by the burning of certain houses in the neighbourhood; that it was necessary to have jedge and warrant for rebuilding the tenement; and that the Representatives of Alexander Reid, and certain other persons, should be discerned to concur in the building.' After several steps of proceeding before the Dean of Guild, a judgment was pronounced, 7th June 1727, finding, 'that jedge and warrant ought to be granted for taking down and re-building, &c.; and therefore granting jedge and warrant accordingly.'

In consequence of this Donaldson's father rebuilt, not only his own part of the house, but also laid out L. 40 : 2 : 7d. in rebuilding and repairing a shop which belonged to the Representatives of Reid.

The Creditors of Reid having adjudged this subject, brought it to sale.— James Donaldson appeared, and claimed a preference for the L. 40 : 2 : 7d. which his father had bestowed upon the building.

Objected by the Creditors, By the law of Scotland there is no hypothec or preference to persons who lay out their money in building or repairing houses, otherwise purchasers and creditors would be insecure. The creditors in this case may have received a consequential benefit by the expense laid out; but is not sufficient to bind them, as Donaldson must have laid it out upon the faith of being repaid by Alexander Reid's heirs; and this point was determined 4th December 1735, James Burns *contra* Creditors of Maclelan, No 45. p. 6240.; and 5th February 1680, Rae *contra* Finlayson, *voce* PERSONAL and REAL. The creditors also *observed*, that the proceedings in obtaining the jedge and warrant had not been strictly regular.

Answered, Though no hypothec is allowed where a person repairs or rebuilds the house of another, without authority from the Dean of Guild, which was the case decided 4th December 1735, James Burns; yet it has been established by practice, that those who lay out money in consequence of a jedge and warrant, have a preference to all other creditors. Neither can this be attended with any danger to purchasers; because, by a search of the records in the Dean