

Iron Timber and other Materials being furnished to one for building a Ship, and the Ship having been sold by publick Auction in a Process against the Builders, who had fully finished her, and she being never launched or Waterborn; in a Controversy for the Price of the said Ship belongeth to the Furnishers of Materials for building her, and other Creditors of the Builder who had not the Price in the Purchaser's Hand: The Furnishers of Materials to the said incomplete Ship, were found to have no legal Hypothec thereto, for their Payment, and therefore the Arrests were preferred to them in Jan. 1726 Maxwell and others contra Worsdop and others. Because there is such Necessity for building a new Ship, as to repair a crazy Vessel that is ready to sink, and that it might seem reasonable that what is furnished to a Ship in any Diligence of Arrestment which might be disappointed by her going off the next Minute; yet a Ship remaining fixed upon the Stocks, is in the same Case of other Wares equally affectable by Diligence, and is no more liable to a tacit Hypothec for Money lent to the Building thereof, than a House is for the Expences of its building.

Tacit Hypothecis in France, with us are 1. That competent to Hereditors Country Land, for a years Rent in the Gravel, or other such things, and to Proprietors of Houses for a Years Rent in the Goods brought in to them. Vid. supra Day 438. 2. That a Ship is liable out of the Sides, which affects all Intermittion to the Sides of their Intermittion 3 July 1728. Maron contra Scot 25 March 1733 Keith contra Gray and Commercial 4. Seamen have a tacit Hypothec on the Ship for their Wages. But these were thought no Part of Bottomry upon the Sea of the Ship for affecting the 5th of January 1768 Tams and others contra Scot. And the Lords had formerly found that Seamen had a Hypothec upon the Ship for their Wages 4 January 1762 Seamen contra Mien. 5th Feb. 1762. And therefore Masters of Ships in such Circumstances are allowed to grant Bills of Bottomry upon the Ships for Money borrowed for that End, which will oblige the Owners to the Value of the Ships. The true Roman Law allows the Reparation of Ships only a personal Privilege inter Creditores Chirographarios l. 26. l. 34 ff de Reb. act. jud. post. Yet a Reaffor may be sold from it for a Hypothec in their Favour: Quia salvam fecit l. 2. l. 3. pignoris Causam l. 6. pr. ff. qui potior in pign. He preserved the Thing in Being for the common Interest both of the Proprietor and Creditor and it is as if were his own to the Value of what he has laid out upon it. Queritur if the Furnisher of Materials for the Reparation of a Ship would have a tacit Hypothec thereon for the Price without Paction, that is without taking a Bill of Bottomry for it?

Queritur if the Owner of a Ship will be liable for Money borrowed by the Master upon Bottomry while he is prosecuting a Voyage in foreign Ports: So also the Master may subject his Owners to the Payment of Money in this Way at Home?

6. Writers have a Hypothec on their Clients Papers in their Hands

By the Roman Law a conventional Right of Pledge is acquired by a Creditor in his Debtors goods moveable or immovable without Delivery thereof to him, the Debtor still remaining in Possession l. 9. s. 2. ff. de pign. act. By which the Debtor hath Right to admit such goods into whose Hands soever they go s. 7. post. de act. This Right is called an express Hypothec. But there is no such express Hypothec of moveables either in France (Les Loix Civiles &c. Tom. 5. Part. 3. Liv. 3. Tit. 5. Sect. 5.) or England, or in Scotland (Stat. Lib. 2. Tit. 12. s. 17. Yes, in proportion. Because of the Inconvenience of subjecting to this Right of Pledge, moveables which are liable to change of Hands. For movables non habent significationem, moveables have no Signification by a Mortgage: That is the Law upon a Mortgage being made no longer than it is in the Custody of the Debtor who is bound, or than he was had it for security is in the custody of it, and if the Debtor makes it to pass into other Hands, by alienating or pawning it, the Creditor cannot any longer lay claim to it.

Sect. 3.

How Pledges and Hypothecis are extinguished.

The Pledge being only an Accessory of the Debt, Payment of the Debt l. 18. s. 2. ff. de signi. hypoth. Intention of the Debt obligation l. 11. s. 1. ff. de pign. act. by whatever act is equivalent to Payment or annuls the Debt l. 1. s. 1. ff. de pign. act. & Quis. mod. pign. si hyp. sol. Quis. et the Pledge or Hypothec given for it. But if the Debtor hath ^{engaged} several Things for the Security of one Debt, he cannot release any one of them without the Creditors Consent, unless he pay the whole Debt l. 17. ff. de pign. hyp. That is all that is due for Principal interest and Charges. By the Roman Law the hypothecary Action competent to the Creditor for recovering the Pledge from any Possessor, was of a longer Duration than the bare personal Action for the Debt. But by the common and modern Usage, if the Debt for which a Pledge was given be extinguished by Prescription, the Pledge which is only an Accessory of the Debt is annulled, Les Loix Civiles &c. Tom. 5. Part. 3. Tit. 5. Sect. 7. l. 9. But a Creditor remains perpetually obliged to restore the Pledge after Payment of the Debt, and can never pretend to have acquired the Property thereof by Prescription l. 10. c. ult. c. de pign. act.