magistrates and their servants: it is fit, by an act of severe justice, to teach them that their office is merely ministerial.

ESKGROVE. Whatever is done by jailors is done by magistrates. The only question is, Whether must this cause be tried by common law or by the act of sederunt. If, by common law, damages must be qualified; not so if by the act of sederunt. I think that it falls under the act of sederunt. There was no mistake here as to the import of a warrant; for there was no warrant, but only an intimation by the agent to the jailor.

PRESIDENT. This case falls within the act of sederunt: the prisoner was discharged without any warrant from the Court of Session. No court has authority to deprive any man of a common law right. During fourteen days after the decreet something might have occurred of so much consequence to the debtor as to have induced any friend of his to purchase his immediate liberty by payment of the debt.

On the 8th July 1788, "The Lords found the magistrates liable;" adhering to the interlocutor of ———.

Act. Henry Erskine. *Alt.* Ilay Campbell.

Diss. Justice-Clerk, Swinton, Rockville, Dreghorn, Monboddo.

1788. *July* 29. JOHN WOOD and COMPANY *against* ARCHIBALD HAMILTON.

HYPOTHEC.

Hypothec does not take place on ships for repairs made in home ports.

[*Fac. Coll. X.* 65; *Dictionary*, 6269.]

SWINTON. I am for the last interlocutor, as being agreeable to the opinion of our lawyers and the decisions of our court of admiralty.

ESKGROVE. A *series rerum similiter judicatarum* in the supreme court ascertains what is law. But I see no series on the point in question. Besides, if an error has been committed by the supreme court in matters of commerce, and not in matters municipal, it may, notwithstanding of practice, be still rectified. That was the opinion of the House of Lords in the noted case of *Hastie and Jamieson.* I do not find that there is any such hypothec, excepting in Holland, of the nature now claimed. Lord Stair does not assert any such hypothec. There is indeed practice in the Court of Admiralty, which I think ill founded. Shall I set it up in opposition to principles? That court has gone too far in granting hypothecs by an irregular and random practice. Wherever there is no room for parties themselves to contract, there necessity requires that the master should have a power of contracting; but necessity goes no farther.

GARDENSTON. Of the same opinion. Strange that the practice in our Admiralty Court should have gone contrary to the practice in England. Probably

because there has been little commerce in this country. There is no necessity for such a hypothec while the parties are on the spot.

MONBODDO. This is a question of *jus gentium;* and I should incline to decide it according to the practice of nations.

JUSTICE-CLERK. If a law can only stand one way, no practice can justify a deviation from it. What is immoral must always remain so. But where there may be inconveniency, but not injustice, in giving this hypothec, we cannot change practice without great injustice. The judgment of the Admiralty Court not reclaimed against is the judgment of the nation. This is not a matter of *lex mercatoria* at large.

HAILES. There is a great cry here of the fatal consequences which will arise from the rejecting this claim of hypothec; and it is said, that on the faith of it furnishings have been made by shipbuilders, &c. to the extent of L.80,000 or L.100,000 sterling. But I am not moved with that state of things. On the 12th December 1787, the Court found that there was no such hypothec. The ship-builders, however, did not take the alarm; but with a judgment of the court against them, which was not altered till the 5th March 1788, they sat quietly under a reliance on the personal credit of their employers, and never sought to secure themselves by actions for payment. Had they relied on the hypothec, the moment that it was called in question and set aside, there would have been scores of actions brought for recovery of their L.80,000 or L.100,000 sterling.

DREGHORN. This is rather a municipal question than of *jus gentium.* If our commerce were to be hurt, I should think that a rule introduced *moribus* might be departed from.

PRESIDENT. It is one of the few spots in the Roman law, that many tacit hypothecs were introduced into it. Our law, though imitating the Roman, has rejected them: the greatest moveable is a ship, calculated to go through the world, yet there is no lien upon it. None of our writers, from Balfour down to Erskine, made any mention of such a thing. A hypothec goes no farther than necessity requires; that is, in foreign ports. There is no authority for extending it, by any of our decisions. With the single exception of Holland, there seems no authority in the practice of nations. In the case of the ship Rebecca, the claim is on open accounts for many years past, which the judge-admiral has sustained. If you allow this tacit lien to run on, it may last for ten, or even for twenty years. What confusion will this introduce; and how are such accounts to be constituted? All persons, creditors to the owners of vessels, of whatever nation, are interested in the decision of this case. The practice of England is of great moment: It denies a tacit lien on that great moveable a ship, and England is the greatest commercial country in the world.

On the 29th July 1788, "The Lords having advised the cause, with the case transmitted for the opinion of English counsel, and the opinion, stating the law and practice of England thereon; they found that Wood, &c. have no hypothec or right of bottomry on the ship in question;" altering their interlocutor of the 5th March 1788, and adhering to their interlocutor of the 1st December 1787.

For the shipbuilder,—H. Erskine, &c. *Alt.* A. Rolland, &c.

Diss. Justice-Clerk, Swinton, Rockville, Dreghorn.