years ago, ploughed up, without challenge, a piece of ground of little or no value, on which the neighbours' cattle were afterwards pastured without further interruption, that was all mere moonshine. There was a great deal of evidence on the other side that this was part of the commonty. Were their Lordships satisfied, then, that the decision of the Court of Session was clearly wrong? If not, (and he certainly was not,) it appeared to him that the judgment of the Court below ought to be affirmed without pressing the hearing further.

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Judgment affirmed.

Agent for Appellant, MUNDELL.
Agent for Respondent, ———

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

STEWART—*Appellant.*
HALL and others—*Respondents.*

REPAIRS and furnishings done at Hull to a Greenock ship, by order of the agents of the owner, at the instance and under the direction of the master. Account made out to "Captain Cowan (the master) and owners of ship Jeanie," attested by Cowan, and addressed to the agents for payment, but payment not demanded for some months. In the mean time, the owner pays the agents for the repairs. The agents become embarrassed in their circumstances, upon which those who did the repairs apply for payment to

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the owner. Held that the owner is still liable; for he can be discharged only by positive agreement, or by necessary inference that those who did the repairs have abandoned that security.

IN 1805, *Hall* and *Richardson*, the Respondents, and several other persons, made certain repairs and furnishings to the ship *Jeanie*, then in the port of Hull, and belonging to *Stewart*, the Appellant, a merchant in Greenock, *Cowan* master. It appeared that the repairs were ordered by Knox and Hay, the consignees of the vessel's cargo, Stewart's agents in Hull. The nature of the repairs and furnishings required were however pointed out by Cowan, the master. The Respondents having executed part of these furnishings, their account, (23*l.* 9*s.* 6*d.*), made out to "*Captain Cowan, and owners of the ship* "*Jeanie*," was attested by *Cowan*, and addressed to "*Knox and Hay*" for payment. Knox and Hay made out an account current as against Stewart, including the sums expended for the repairs; and upon this account there was a balance due to Knox and Hay of 157*l.* 13*s.* 8*d.*, for which Cowan, the master, drew a bill on Stewart, in favour of the agents, which bill was duly paid. The tradesmen's accounts for the repairs, signed by Cowan, and making the owners debtors, were transmitted to Stewart, as vouchers for their having been paid by Knox and Hay, but no receipts were sent.

The repairs by the Respondents were done on the 5th March and 15th April. At the close of the year, according to their usual practice, the Respondents applied to Knox and Hay for payment,

and were then told that they had not settled with the owner. In the beginning of 1806, Messrs. Knox and Hay having become embarrassed in their affairs, the Respondents wrote to the Appellant for payment of their account, as follows:—

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"*When your vessel, the* Jeanie, *was here in* "*March last, we did some work at her, as per* "*annexed account, amounting to* 23*l.* 9*s.* 6*d. for* "*which we have not been paid either by Captain* "*Cowan or his agents, Messrs. Knox and Hay.* "*The latter persons, it is said, are in difficulties.* "*We therefore hand you the account, and request* "*you will be so kind as remit us for the same.*"

The Appellant having refused to pay, the Respondents, by their mandatory, commenced an action against him in the Court of Session for the amount of their account; and a condescendance having been given in by the Defender, (Appellant,) by order of the Lord Ordinary, (*Hermand,*) and answers lodged by the Pursuers, his Lordship, on the 10th February, 1807, pronounced an interlocutor in favour of the Pursuers, (Respondents.) This interlocutor was adhered to after representation, and by the Court after two reclaiming petitions; and the Appellant then lodged his appeal.

Feb. 10, 1807. Interlocutor of Lord Hermand in favour of Respondents. (For the terms of it *vide post.*) Adhered to by the Court.

Appeal.

There was much elaborate discussion in the proceedings below, and appeal cases upon the question, Whether the Respondents had a right of hypothec upon the vessel for the repairs done? which, however, it would be out of place here to touch upon, as this appeared to be merely a personal action, and

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as such was on all hands treated in the Court of Appeal.

Nolan and *Adam, jun.* (for Appellant.) They did not mean to controvert the point of law, that the captain had power to bind the owner, but they had offered to prove that the master had not in fact bound the owner. (Lord Eldon. *If the master desires and permits the agents to order repairs, which are executed, am I not entitled to conclude that the owner is liable, unless I have notice to the contrary?*) But what the Appellant offered to prove was, "that the repairs were done solely on "the employment and on the credit of Knox and "Hay, that the orders were carried to the trades-"men by their clerk, and that Cowan communi-"cated with Knox and Hay, and with them only." This was positively averred; and supposing the law to be that, in such a case as this, the orders of the master bound the owner, still, if there was a positive agreement that the agent alone should be liable, that would discharge the owner. This was a fact which the Court below ought to have inquired into. They also submitted that, under the circumstances of this case, payment to Knox and Hay might be considered as payment to Hall and Richardson. In foreign cases, when the goods were furnished, the account was immediately given in. Here the Respondents had allowed the matter to rest for nine months without knowing any thing of the owner: they had waited a long time before they applied to Knox and Hay for payment; and it was only when Knox and Hay failed, or were on the point of fail-

ing, that they applied to the owner. The owner had actually paid the agent for these repairs, and if the tradesmen lay by, they must be presumed to have been satisfied with the security of the agent.

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Abbott and *Brougham* (for Respondents.) From the facts in the condescendance and answer, a plain proposition of law resulted in favour of the Respondents. (Lord Eldon. *Did you* (Nolan) *apply to the Court for a proof of the alleged fact, that the repairs were made solely on the employment and credit of the agents?* Nolan. *We stated that it ought to be inquired into, and the Lord Ordinary said it was irrelevant.*) It was, indeed, stated in the printed case that they had offered proof which was material; but there was no such offer in the proceedings below. The document which, as they said, contained the averment, did not conclude with a prayer that they might be allowed to prove it. It was immaterial how the repairs were ordered: the work was done, and the account was made out to "*Captain Cowan and* "*owners of ship Jeanie,*" and was attested by Cowan, which was decisive. There was no undue delay in calling for payment, as all work in this country was done on credit of more or less extent. The presumption of law was in their favour. The ship owner might not be personally known to those who made the repairs, but the ship was known, and the owner might therefore easily be found out. The case was plain, and would have been decided here in half an hour.

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Judicial observations.

Lord Eldon (Chancellor.) The Court of Session had embodied in their judgment the reasons on which that judgment was founded, (a thing not unusual with them,) and he would read the judgment, that their Lordships might be fully aware of these reasons, and how they bore upon the Appellant's answers to the claim of the Respondents. The interlocutor of the Lord Ordinary (afterwards adhered to by the Court) was as follows:—

Lord Ordinary's interlocutor.

"*Having considered this condescendance, with* "*the answers thereto, and whole process, finds it* "*implied, though not in express terms admitted, in* "*the condescendance, that repairs to the amount* "*libelled, were made by the Pursuers, upon the* "*ship* Jeanie, *belonging to the Defender, when* "*lying at the port of Hull: that these repairs* "*were made by order of John Cowan the master,* "*by whose desire the account was sent to Knox and* "*Hay, the agents, at Hull, for the Defender:* "*that it is stated by the Defender that he paid* "*this very account to Knox and Hay, which he* "*could not have done in any other character than* "*that of his own agents. Finds that the port of* "*Hull must be deemed a foreign port in any ques-* "*tion with an inhabitant of Scotland; so that,* "*upon the principles adopted in the case of* Hamil- "ton v. Wood, *the Pursuers have an hypothec* "*upon the vessel for the expenses of these repairs.* "*Finds nothing condescended or relevant to infer* "*that they relinquished that right. Repels the* "*defences. Finds the Defender liable for the sum* "*libelled, with interest from one year after the* "*date of the account, and decerns.*"

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It had been suggested at the bar that it was essential to send the case back again to the Court of Session, with directions to inquire into the truth of the several averments in the answer. Now, however much they might lament, in a question respecting 29*l.*, (23*l.* 9*s.* 6*d.*), which had been discussed in every possible stage in which it could be discussed, throughout that part of Great Britain and Ireland called Great Britain, at a vast expense to the parties; however much they might regret sending back such a cause to begin again; still, if the question of law required it, that must be submitted to, and the cause must be sent back. But before this was done, they ought at least to be fully satisfied that the necessity clearly existed.

This action was brought for furnishings done to the ship *Jeanie*, for the amount of which the Appellant was stated to be personally liable, and judgment was given for the Respondents. Such being the state of the case, if the interlocutor of the Court below contained sufficient ground to support it, accompanied however with unauthorised matter, their Lordships would merely order the objectionable matter to be expunged, and then affirm the judgment.

Interlocutor of Court below well founded, but containing unauthorised matter; the Lords will expunge the objectionable matter, and then affirm the judgment.

This was a mere personal demand; and, in defence, it was stated, on the part of the Appellant, that if these repairs had been made by the Respondents, it must have been on the employment of Knox and Hay, and upon their credit; and that therefore they alone were liable. The Court (Lord

This a mere personal demand.

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Grounds of defence.

Ordinary) then called upon the Appellant to give in a condescendance of the facts upon which he relied in his defence; and then he stated them more particularly, contending, "*that the repairs were* "*made on the employment and under the direction* "*of* Messrs. Knox *and* Hay; *that when the work* "*was finished, the accounts were attested by the* "*master, in order to satisfy* Knox *and* Hay *that it* "*had been performed; that these accounts were* "*addressed by him to* Knox *and* Hay *for payment,* "*and delivered back to the tradesmen to obtain* "*their payment from* Knox *and* Hay *accordingly;*" by which the Appellant must be understood to mean that Messrs. Knox and Hay were considered as the debtors, and that the credit of the owner of the vessel was not looked to. Then the parties proceeded with the discussion of the question of hypothecation, and whether HULL was, or was not, a foreign port in regard to Scotland, with all those topics which formed the subject of that infinite number of pages, printed and written, which had been laid on their Lordships' table.

If their Lordships would advert to the printed papers, and compare them with the original proceedings, they would find that the effect of one of the grounds of defence relied upon by the Appellant had been totally mistaken. It was stated "*that* "Cowan (*the master of the vessel*) *communicated* "*with* Knox *and* Hay, *and with* them only; *that* "*he made no bargain, and gave no direction, either* "*to the Pursuers,* (*Respondents,*) *or any other* "*tradesmen, who were all employed by Knox and*

" *Hay, at their own discretion, and on their own* Nov. 10, 1813.
" *credit; that a note was made by one of their*
" *own clerks of what work and necessaries were* LIABILITY OF OWNER FOR
" *wanted, and then another of their clerks carried* REPAIRS DONE TO A SHIP.
" *the orders, which were consequently made out and*
" *sent round to the various workmen they had been*
" *in use to employ.*" Now it was established on the proceedings, that *Cowan* communicated on the subject with Knox and Hay, but *not* that he did so with *them only.*

The answer to this, on the part of the Respondents, was, " *that they were applied to by Knox and*
" *Hay, and Cowan, to make the furnishings; that*
" *the repairs were accordingly made; and that*
" *when completed, betwixt the 5th March and*
" *15th April,* 1805, *the Respondents made out*
" *their account with the title,* ' Captain John Owner of the ship made the debtor in title of Respondent's account.
" ' Cowan, and owners of ship Jeanie;' *which*
" *having been attested by* Cowan, *was by his desire*
" *handed over to Knox and Hay for payment.*"
This title of the account *had not been stated by Stewart;* but the fact appeared to be, that the Respondents had made out their account to those who would, at any rate, by law, be their debtors, unless there was a special agreement to the contrary. The matter, however, did not rest there. When Stewart came to pay Knox and Hay, if he called for a voucher, they had no voucher to show, except an account which bore upon the face of it, that Stewart himself, the owner of the vessel repaired, was considered by the Respondents as their debtor.

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He doubted whether, after having given in their account in this way, the Respondents could at all have called upon Knox and Hay to pay; but, at all events, taking the whole together, he could find nothing to show that the Respondents had relinquished their right as against the owner.

Nothing in the case to show that the Respondents had relinquished their claim against the owner.

If the owner was by law the debtor, it must be shown, by positive and direct evidence, or appear by necessary inference, that the creditor had abandoned that security, before the owner could be discharged from his liability. Would it not be the strongest thing in the world to say, that when the Respondents had been required to do these furnishings, and had given in their account in a way which so clearly showed that they considered the owner as their debtor, they should be held as having given up their right as against him? And yet these were the circumstances under which their Lordships were called upon to say that the owner was liberated. He believed their Lordships could not—he himself certainly could not—come to that conclusion. The owner himself might have known that he was liable. If he called for a voucher, he must have seen that he was considered as the debtor; and if he did not call for one, his loss was owing to his own want of diligence, and he had no right to complain.

The owner by law the debtor, and not discharged unless by positive evidence, or necessary inference, that the creditor had abandoned that security.

No foundation for the objection on the ground of delay.

With respect to the delay, the Respondents had applied for payment at the usual time, and Messrs. Knox and Hay would probably have been very angry if they had done it sooner; but finding that Knox and Hay had fallen into difficulties, and

were not likely to pay, they applied to the owner. There was really nothing in that objection.

In regard to the judgment itself, it might be advisable to expunge that part which related to the hypothecation of the ship. It was not their Lordships' practice voluntarily and unnecessarily to permit assertions respecting important doctrines of law to be entered on their records; and so far therefore it might be proper to reform the interlocutor.

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The interlocutor of the Court below to be reformed by expunging the reason of hypothecation.

Then as to the matter of costs, he had often occasion to find, since he had obtained a seat in that House, that it was in many cases more difficult to settle the affair of costs than the merits of the principal question. This was a dispute about 29*l.*, (23*l.* 9*s.* 6*d.*); but then it was said there were other cases behind, which depended on the issue of the present question. Where any great doctrine of law was involved in a particular case, and required to be settled, then certainly it would be desirable that the expense should not fall too heavily on the unhappy individual who came first, though generally there was an agreement out of doors which set that matter to rights. But as the present case brought no great doctrine of law fairly into question, it appeared fitting that the Respondents should be in some measure reimbursed the expenses to which they had been put by this experiment on the part of the Appellant. That they might proceed, however, with due caution on this point, he proposed that they should take a little time to consider the question of costs. At the same time, he was even now of opinion that some costs ought to be given.

Costs.

Where an important question of law is to be settled, the expense ought not to fall too heavily on him who came first.

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LIABILITY OF OWNER FOR REPAIRS DONE TO A SHIP.

Judgment of Court below (except as to the ground of hypothecation, which was expunged) affirmed, with 60*l.* costs.

Judgment.

Agent for the Appellant, MUNDELL.
Agent for the Respondents, WATKINS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DEMPSTER and others—*Appellants.*
CLEGHORN and others—*Respondents.*

Nov. 26—29, 1813.

SERVITUDE.—ST ANDREW'S GOLF CAUSE.

SERVITUDE, or right of playing golf without obstruction on the golfing links of St. Andrew's, claimed by certain persons, inhabitants, of that city and members of the St. Andrew's Golf Club, on the ground of immemorial custom, for the inhabitants, *and all others* choosing to resort thither for the purpose of playing golf. The title of the Respondents to pursue in the above character sustained by the Court of Session; but, on account of discrepancies, real or supposed, between the different interlocutors, the whole cause remitted for review.

1797 Feu of St. Andrew's golfing links to Lord Kellie.

IN 1797, the magistrates and town council of St. Andrew's, proprietors of the golfing links in the neighbourhood of that city, sold these links to the Earl of Kellie, who was then Provost of St. Andrew's. The links were immediately before this let to a person of the name of Ritchie, in whose lease there was this condition among others:—"*The tacksman shall not have it in his power to*