OATH.

DIVISION I.

Oath *in litem.*

SECT. I.

In what cases admitted.

1662. *July* 3. LORD COWPER *against* LORD PITSLIGO.

No 1.

ONE being pursued to restore a watch, or the *pretium affectionis*, the defence was, that *sine dolo desiit possidere* having in the pursuer's presence given away the watch, the pursuer making no opposition. THE LORDS would not suffer the price of the watch to be proved by the pursuer's oath, but *prout de jure.*

Fol. Dic. v. 2. *p.* 8. *Stair.*

*** This case is No 11. p. 5626. *voce* HOMOLOGATION.

1672. *December* 11. CARNEGIE *against* NAPIER.

No 2.
Some goods in a ship being damaged by the skipper's neglect, the pursuer's oath *in litem*

THOMAS CARNEGIE having put a pack of lint in a ship at Leith, to be carried to Montrose, the skipper put the pack in the bottom of the ship, under a loading of coals, and there having a leak fallen in the ship, by his taking of ground after she came to her port, the salt water coming in, mixed with the coal-coomb, spoiled the lint; whereupon he pursues the skipper and owners for the damage sustained in the lint, and insists against all the owners *in solidum*; and

No 2.
was not admitted, but he was ordained to prove the damage.

for proving the value of the damage craves his own oath *in litem*. The defender *alleged* absolvitor, because any damage the lint had sustained was *casu fortuitu*, by striking up a leak in the ship; but he having done his duty as a provident master, was free, especially seeing there was a great storm and rain when he embarked the coals, so that it was more provident for him to put the lint under the coals, to save it from the rain, than above, and the lint could have received no hurt by the coals, if a leak had not happened; 2*do*, Albeit the skipper was liable, yet the owners are only liable for their proportionable parts, according to their interest in the ship; and albeit the Rhodian law, approved by the Roman law, did make all the exercitors liable *in solidum*, both for the fault of the master and skipper, and for the master's contracts, yet the custom of nations hath on good ground changed the same, and made the exercitors or owners liable for no more than their interest in the ship could reach to, upon this consideration, that it would be a great discouragement to navigation, if owners should be liable for the engagement or fault of the master of the ship, whatsoever the same might be, though far exceeding the stock or profit that could arise by the ship; as if a freight of the greatest value were dilapidated and embezzled without their knowledge; which custom hath been still observed in Holland, who best knew the advatage of navigation; and as to the oath *in litem*, albeit it be allowed in the case of spuilzie, or other cases where there is force or fraud, yet it is never allowed where any other probation could be adhibited, as might have been in this case, by taking a bill of loading from the skipper, and likewise the weight and worth of a pack of lint is probable by those who carried or delivered the same, and the pursuer having gotten back his lint, might have shown his damage to the skippper, and taken witnesses thereupon. It was *answered* for the pursuer, to the *first*, That it is obvious to common apprehension, that it was most improvidently done to put lint under a loading of coals; neither can a leak be accounted *casus fortuitus*, seeing it frequently occurs; but the skipper ought to have put the lint above and to have covered it, or to have put it in an end of the ship free of the coals, that in case of a leak it might have been pulled up. As to the *second*, There is no such common custom of nations, but a particular custom of the Hollanders, which is only with this limitation, that the engagements may not exceed the value of the ship, in so far as concerns the contracts with the skipper; but there is no such custom there, that the delinquencies of the skipper oblige not the owners *in solidum*, being within the value of the ship, and in this case the lint is of very small value, and the reason of the law is very effectual, that he who contracts with one, should not be obliged to pursue many, which would be a great impediment to trade.

The Lords found that the skipper had not done his duty, and that he and all the owners were liable for the damage *in solidum*, but found that he ought not to have *juramentum in litem* but admitted the damage to his probation. *See* Solidum et pro rata.

Fol. Dic. v. 2. p. 8. Stair, v. 2. p. 130.

*** Gosford reports this case :

No 2.

1672. *December* 12.—CARNEGIE having put aboard of a vessel of Montrose a pack of lint; after which, the skipper going to Culross for a lading of coals, did take aboard the coals above the lint; and after the vessel came to Montrose, lying within the harbour there, did strike up a leak, whereby the sea water being mixed with the coal, did spoil the whole lint; whereupon he did pursue Napier, as one of the owners of the vessel, for damage and price of the whole lint, and craved that he himself might have *juramentum in litem*, the lint not having been prized before it was put in the ship. It was *alleged*, That the owners of a ship, not having contracted with the pursuer, who did entrust the skipper, without their knowledge, they could not be liable for his fault; 2*do*, Albeit they were liable, they could only be decerned according to the value of the ship, conform to the law of Holland, England, and almost all Europe, which is founded upon good reason; for if a skipper, colluding with a merchant, or being unskilful or negligent, should take in a loading of great value, and then miscarry by his fault; if the owners should be liable for the whole damage, they might easily be ruined in their fortunes, and thereby all trade and commerce suppressed; 3*tio*, The owners must all be convened, and are only liable in law *pro rata portione*, according to their interests in the vessel; 4*to*, The pursuer cannot have *juramentum in litem*, because that is only granted in the case of spuilzie or depositation, where no witnesses can be had to know the value of the goods spuilzied or entrusted. It was *replied*, That it is clear, by the law, *de actione exercitoria*, that if owners trust a ship to a skipper, they are liable for his fault or negligence, and every one of them may be convened in solidum ne qui cum uno contrahit in plures distrahatur, as the Lords did lately find in a case, , and are liable to the whole value of the goods lost, by the civil law, and the laws of most part of kingdoms, Holland being singular as to that custom, as appears by Grotius and Vinnius; the reason being, that the most part of all the inhabitants are owners of vessels, and in their own favours have obtained that law to be established. And to the *last* part it was *replied*, That it being in the skipper's power to have valued the goods or refused the same, as in the cases of caupones stabulari, et actione institutoria, the law allows *juramentum in litem*, if the goods intrusted be lost, and so ought it to be here.

THE LORDS did find, That the fault of the skipper who was intrusted with the ship, makes all the owners, or every one of them, liable *in solidum*; but refused to grant *juramentum in litem*, seeing the merchant might have got a bill of loading, and that a pack of lint was a thing that might be easily valued by the deposition of witnesses, and was not alike as when a cloak-bag with jewels or money is intrusted to an innkeeper or stabler, or deposited. And as to that point, if the owners of a ship be liable further than the value of the ship, they

No 2. did not determine, this pack of lint being within the value; but it seems agreeable to the civil law and sound reason, that they should be liable as effectually for the master of the ship's fault, as he himself is liable, without all question; and there is par ratio, where exercitores per se vel alium exercent, the skipper being but in effect a servant, and oftentimes of no fortune.

Gosford, MS. No 538. *p.* 285.

1734. *December* 21. Campbell *against* M'Laren.

No 3. Some goods having been alleged stolen out of lock-fast places in a country house, the master's oath *in litem* was sustained as a proof of the quantities and values, against the servant to whom the key of the outer door was entrusted, and who was not alleged to have any accession to the theft, but who was found liable, upon this single circumstance, that he had been *versans in illicito* in lodging a travelling packman one night in his master's house; though the packman was not the thief, and the goods must have been stolen some time thereafter. It was *argued* for the servant, That the oath *in litem* can only be admitted where it is *aliunde* certain a theft is committed; and supposing this proved, can only be admitted against the person who has been principal or accessory to the theft; and yet here there is no other proof, save the pursuer's oath, that any theft was committed at all, neither is the defender alleged to be accessory; and the circumstance of lodging the travelling packman, when no damage happened, cannot be qualified more penal than neglect; which was repelled, in respect it was *answered*, That supposing the servant liable, there scarcely can be any other proof, in the nature of the thing, than the master's oath.——See Stair, L. 4. T. 44. § 4. *See* Appendix.

Fol. Dic. v. 2. *p.* 9.

*** See No 8. p. 1817.

SECT. II.

Where there is *probabilis ignorantia.*

No 4. Spuilzie of teinds was not allowed to be proved by

1662. *December* 18. Lord Balmerino *against* The Town of Edinburgh.

The Lord Balmerino pursues the Town of Edinburgh, for spoilation of the teinds of the acres of Restalrig, whereof the Town's Hospital had a tack; which being expired, inhibition was used yearly, for several years. The defender *al-*