

## S E C T. IV.

## Betwixt Proprietor and Custodier.

1734. December 21.

JOHN CAMPBELL, Taylor in Edinburgh against CHARLES M'CLARIN.

A BURGESS of Edinburgh, who had a country-house some miles from the town, was in use, when his family was not there, to trust the key of his outer door with his gardener. Some goods in a chest of drawers, to the value of L. 5, being stolen, while the master was in town, the servant was found liable for the same, though it was not pretended, that he, or any of his family, had committed the theft; and though it was *pleaded* for him, That he was liable in no sort of diligence further than to keep the outer door locked: But the LORDS went upon this circumstance, that he had been *versans in illicito*, in so far as one night he had lodged a travelling packman in the house, which they thought sufficient to throw the burden upon him, though he made out clearly, that the packman could not be the person who stole the goods. See APPENDIX.

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Fol. Dic. v. 2. p. 59.

## S E C T. V.

## Betwixt Merchant and Shipmaster.

1677. November 7.

LAWRIE against ANGUS.

THOMAS LAWRIE, merchant in Edinburgh, having obtained decret against James Angus, skipper in Leith, for 500 merks, for the damage of a box of silk ware, which was wet by the leakage or spouting of the pump, and L. 100 for detaining the said Thomas's ware, and not delivering the same at the arrival of the ship, though he required it, and offered the freight; James the skipper suspends, and raises reduction on these reasons, *imo*, That the Bailie had done wrong in repelling this defence, that the ship and pump were sufficient at the embarking of the goods; and that the merchant himself was present in the ship with the goods, and that this box damnified was stowed in a secure place in

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A shipmaster found liable for the damage of silk put near the pump, altho' the merchant was on board during the voyage.

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the ship, but that the merchant himself caused change it from that place, and placed it near the pump; for the freighting of goods in a ship being *locatio* and *conductio*, where there is a mutual benefit to both parties, the locator is only liable *pro media diligentia*, and *propter culpam levem sed non levissimam*; so that here the skipper having done what a provident skipper ought to do, viz. to have a tight ship and a sufficient pump, he was not liable for any damage, though it had been possible to prevent the same by the most exact diligence, much more when the damage is by the fault of the merchant choosing a place near the pump, and specially where the damage is *ex casu fortuito et improviso*, viz. that the pump being sufficient at the loosing, a split or rift was broken therein upon the voyage, which no man could foresee; and if the skipper should be liable for such accidents, it would discourage navigation, the necessary mean of commerce, and there is no location where less enquiry should be made of diligence, which must be presumed, seeing the skipper ventures his own life and ship, and therefore must be presumed to take narrow inspection and care of the sufficiency of the ship. It was answered for the merchant, That albeit it be the common opinion that locators are not holden for the highest fault, yet there are specialities as to masters of ships and seamen by the edict *nautæ cautiones stabularii*, &c. and many other of the Roman laws; for thereby it is clear, that if any thing be lost, lacerated, or spoiled in the ship, by whomsoever, the owners or master are liable simply, and will not be freed upon pretence of any diligence; and therefore, by the custom of all maritime courts, the skipper is still liable to restore goods as he received them, without any damage, except what occurs by stress of weather, whereby a ship may be extraordinarily shaken, or by any disabling of the ship by touching upon a rock, sand-bank, or piracy; but as to the case in hand, the bill of lading is produced, bearing the receipt of the ware, good and well conditioned, to be restored in like condition, adventure and hazard of sea being only excepted, which clears a special contract betwixt merchant and skipper, by which the skipper *suscepit periculum*, except only the hazard of sea, viz. stress of weather, naufrage, or the like, which being the common style of bills, settles the case betwixt merchant and skipper, and being an exception of sea-hazard only, puts all other hazard upon the skipper; so that it will not be sufficient for the skipper to prove that there was no perceivable fault in the ship or pump when he loosed from his port, but he must instruct an extraordinary hazard, as being shaken with storm; but if a leak break up in his voyage, without stress of weather, the merchant runs no hazard therein, much more if his pump split or spout when he hath received in fine ware; and if it were otherways, traffick would be exceedingly discouraged, for the sufficiency of the ship, and the incident leakage, could only be probable by seamen, which the law terms *improbum genus hominum*, and who are the master's own servants; neither doth it alter the case that the merchant was aboard, for he neither did nor was obliged to notice the insufficiency of the ship, which lay on the skipper's trust and peril, neither did he order his goods

to be set by the pump, and though he had, all the ship ought to have been tight, and at least the master or seamen ought to have signified the danger of being near the pump, that the merchant might directly or tacitly have taken his hazard; and by the act 14th, Parl. 1466, it is statuted, that no ship be freighted without a charter-party, containing therein the several articles therein expressed, especially that no merchant goods be riven or spilt with unreasonable stowing, &c.

THE LORDS, before answer, having appointed probation, *hinc inde*, in what condition the pump was in at loosing; if it had a stillege of timber about the pump, and if it was the ordinary custom to cover such stilleges with pitched canvas, and if this was so covered; and how it came in the voyage to spout, and if there was any stress of weather or accident at sea; and if the merchant choosed to set his ware by the pump, and if the hazard was signified to him; the probation being closed and advised, it was found, that the merchant choosed not to set his goods by the pump, and that the seamen could perceive no fault in the pump when they loosed, but that there broke up a rift or split in the voyage, and that the weather was fair all the time of the voyage, without any stress or accident; whereupon the LORDS ordained either party to be ready to debate that point, whether the hazard of leakage, and such ordinary hazards as occur not by stress of weather, but only from the ship and her furniture, lie upon the merchant, or the skipper and his owners; and having heard them at length thereupon, they found that these ordinary hazards not arising from stress of weather, or any such extrinsic accident, but from the condition of the ship, lie not upon the merchant, nor are relevant to free the skipper, who must have his ship sufficient at his peril; and found no difference whether the merchant were aboard or not.

*Fol. Dic. v. 2. p. 59. Stair, v. 2 p. 553.*

\* \* \* Fountainhall reports this case:

THOMAS LAWRIE, merchant, convenes Angus, skipper, on the 14th act, Parl. 2d, James III. for spoiling his goods with sea water. THE LORDS found the skipper liable for the damage, as not being wholly *ex casu fortuito*. *Vide Peckius de re nautica*, (p. 815;) for the skipper had here laid the goods under the pump, and altered them from the place where they were first laid.

*Fountainhall, MS.*

1680. July 24.

COLIN LAMONT, Skipper in Kirkcaldy, against HENRY BOSWELL,  
Merchant there.

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A CHARGE on a charter party for the fraught. *Alleged* their goods were damaged by two leaks, sprung in his ship. *Answered*, That was *casus fortuitus* not