

E X E R C I T O R.

1707. March 26.

WILLIAM COLTRAIN, Provost of Wigton *against* JOHN MATHIE, Skipper of Prestonpans.

PROVOST Coltrain freights a ship belonging to John Mathie, whereof Thomas Mathie, brother to the said John, was master in-put by the said John, to go to Norway, and bring home a loading of timber and tar, and gave him L. 2000 Scots as a stock-purse for buying the same. John Mathie, thinking it needless for his ship to go out empty, he loads it with victual to be carried to Rotterdam, and that the delivering of the victual there would not much retard or delay the intended voyage to Bergen in Norway; but it fell out, that he was so long detained in Holland, by the heating of the victual and other incumbrances, that the Norway voyage was altogether laid aside and disappointed; whereupon the Provost pursues John and Thomas Mathies, for repaying the stock-purse, and refunding his damages sustained by deserting the voyage. *Alleged* for John Mathie; That he was only part owner of the ship, for three fourth parts of it, and so can be no further liable than to cede, dispo- and surrender his share and interest in the ship, and cannot be charged *in solidum* for the whole; even as a master, by the Roman law, was liberated from the damages done by his slave, *deditione servi*; and this is now become the fixed law of most trading nations, especially Holland and France, as is attested by Gro- tius, *lib. 2. de jure belli et pac. cap. 11. No 13.* where he says, *male jure Roma- no introductum est, ut exercitores ex facto magistri in solidum teneantur*, as being against natural equity and public utility to make them farther liable than *ad aestimationem navis*. And Mr Justice, who has translated the maritime naval laws and ordinances of France, page 339, article 2, says, that, by an edict of Lewis XIV. the owners of ships are liable for the deeds of the master and skip- pers, but may be discharged and assoilzied if they abandon and resign their interest in the ship's freight. And Stair, *tit. MANDATE AND COMMISSION, No.*

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The freight- ers of a ship trusted the master with a sum of money for the pur- pose of buying goods. The master having absconded with the mo- ney, in an ac- tion against the owners of the ship at the instance of the freighters, the Court assoil- zied the own- ers.

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18, the extraneous contracts of ships bind not the exercitors; for it seems against natural equity and reason, that an owner of a ship, by trusting a skipper, should by his negligence or dole be exposed to more debt than his precise interest in the ship; it is true, as to the tackling, furniture, and provisions to a ship, the master's contract binds the proprietors as *negotium utiliter gestum*, such as the repairing it with new anchors, cables, or sails; but as to extrinsic bargains it is otherwise. *Answered*, Where the exercitors and owners of a ship put in a master or skipper who proves unfaithful, the owners must be liable *ex quasi delicto* in choosing so unfit a person; and the Roman law is clear on this head, *ex edicto prætoris nautæ cautiones stabularii, l. ult. § 5. cod. tit. and l. 1. § 8. Dig. de exercit. act.* making them all liable *in solidum, ne in plures adversarios distrahatur is, qui cum uno tantum contraxit.* And though France and Holland have departed from the common law in this point, yet other nations have closely adhered thereto, as Antwerp, *teste Groenevegen de legibus abrogatis*, and Lubec, in *Marguardus de mercatura*; and Wandermnellen, in his learned commentary on Grotius, censures him for this very opinion; and our countryman Wallwood, in his sea laws, follows the Roman custom in this point. THE LORDS thought the case new, and deserving inquiry, what the custom of England, and other trading nations, besides Holland and France, was in this point; therefore deferred the decision till the next session.

December 16, 1707.—In the cause mentioned 26th March 1707, pursued by Coltrain and Simeon Guilan *contra* John Mathie, they reformed their allegiance in this manner, that the said John Mathie owner of the ship, put in Thomas Mathie, his brother, as skipper and master to navigate the same, and that they gave the said Thomas 724 dollars, as a stock-purse to buy tar and deals with it in Norway, and which John was not ignorant of; but Thomas neither restored their money, nor goods or effects in place of it, by which they lost both their stock, with exchange, and profit to the double they could have made, if it had been returned in goods; and the said Thomas being input by you John, you must be liable for his deed. *Answered*, Absolvitor from the stock purse as to the owners, because the skipper was not *huic rei præpositus*, and it fell not under his general commission *qua* skipper, but you trusted him *tanquam quilibet*, and having followed his faith, you can never bind the debt upon the owners; the skipper's contracts in so far as concerns the out-reeking or repairing the ship on bottomry oblige the exercitors; but if he buy cargoes, negotiate bills, or carry money abroad, these are private transactions, in which his owners are not concerned, as appears from *l. 1. § 3 and 7. l. 6 § 12. de exercitor. act. si modum præposituræ egressus fuerit, non obligabit exercitorem.* *Replied*, It is confessed, that generally speaking, numerate money is not a merchandise, but in our trade to Norway we have no other thing, except victual, to send there; and in that case it is *loco mercis*; and by the edict *nautæ cautionis*, there arises an action to the freighters against the owner for the damage they sustained

by the dolo, negligence, or fault of the skipper, *quod minus fideliter et negligentium opera usus sit*, l. ult. § 4. eod. tit. § ult. *Instit. de obligat. ex quasi del.* and therefore John Mathie must be liable for his brother's running away with the stock purse. THE LORDS having read his receipt, and it not mentioning dollars, but a neat sum, and bearing an obligation to be countable at meeting, they found this receipt did not bind his owners, since they followed his faith; and it did not appear he was *huic negotio præpositus* by the owners, the money being delivered to him to account as a fungible, and not as a *corpus*; and therefore assoilzied John Mathie from the pursuit.

Fol. Dic. v. 1. p. 280. Fountainball, v. 2. p. 366. 403.

* * * Forbes reports the same case :

PATRICK COLTRAIN and Simeon Guilan having charged John Mathie upon a decret before the Admiral, for the sum of 1575 pound Scots, as three fourth parts of 2100 pound entrusted by the chargers to Thomas Mathie skipper in Prestonpans, upon his receipt, as a stock purse for buying of timber and tar in Norway, effeiring to John Mathie's shares *qua* owner of the ship freighted by the chargers, whereof Thomas Mathie was skipper, John Mathie raised suspension and reduction of the decret, upon this ground, that the Judge committed iniquity in finding the owners liable for the stock purse, albeit the skipper was not *huic rei præpositus*; and the owners can only be liable upon contracts entered into with the skipper in the terms of his *præpositura*. For if a skipper should undertake to negotiate bills, buy cargoes, or carry money abroad, his own faith is only followed for the performance, and not his owners, who put him not in for that effect; owners being only liable for the contracts of the master of the ship in relation to the presumed subject of his trust, as the taking goods on board, refitting and victualling the ship, and paying the seamen's wages, L. 1. §. 7. *ff. de exercitoria actione*; whereas the buying or selling of merchandize, and such a trust as Thomas Mathie had from the chargers, falls not under the general trust of a skipper's office, but requires a particular commission, L. 1. § 3. and 12. *ff. eod. Stair, Instit. Lib. 1. Tit. 12. § 18. in fine.*

Answered for the chargers; By the edict *nautæ caupones stabularii* (which regulates all cases betwixt owners, freighters, and skippers), action is competent to freighters against the owners, for any damage sustained through the fault or fraud of the skipper or master; *quod minus fidelium et negligentium opera utuntur*, L. ult. § 4. *ff. eod. § ult. Instit. de oblig. quæ quasi ex delicto*: And the suspender having entrusted Thomas Mathie to navigate his ship, and to let her out to freight, he is obliged for his fidelity, and must answer for his embezzlements, and running away with the stock purse. Nor doth it alter the case, that the skipper's receipt mentioned a particular sum received, and obliged him to hold count therefor; especially considering, that money, in the cases of

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Norway and Indian voyages, is reputed merchandize, as well as other fungibles; and the most part of cargoes carried from Europe to the Indies consist of dollars; and the *Lex Rhodia* brings money as well as other goods in contribution upon gross average. Again, the skipper's receipt was truly a bill of lading, *mutatis mutandis secundum subjectam materiam*; though it bear not, 'that the stock purse was shipped in good order, and well conditioned, and to be delivered in the like good order,' which had been incongruous: And though the receipt obliges only the granter to be countable for the money at meeting, that did not free him of his duty of *vectura* as a skipper; and not to find the suspender liable in this case, would have an evil consequence upon commerce.

Replied for the suspenders; The Roman edict of *Nautæ Caupones Stabularii, &c.* cannot take place here, in respect the skipper was not *tali negotio præpositus* by the exercitors: And the chargers who followed his faith as to the money given him to buy goods, must pursue him not as *nauta*, but *tanquam quilibet*, as accords. 'Tis but trifling to extend a sum of money for which the granter was countable, to a bill of lading by which the *individuum corpus* is to be delivered *in specie*: It might with the like reason be contended, that a person might alienate his heritage by testament as well as by disposition, there being little difference but *mutatis mutandis*. The suspending of the letters will not discourage commerce; but only be a rule to merchants how to freight ships fairly hereafter, by not exporting money contrary to law, Act 11, Session 3, Parliament 1. Charles II.; or endeavouring to ruin owners of ships by private pactions with the skippers.

THE LORDS sustained this reason of suspension and reduction, that the skipper was not *huic negotio præpositus*, and that the receipt for the money was not granted by him as skipper, but as one whom the charger trusted with so much money, which could not oblige the owners.

Forbes, p. 209.

1732. July 25.

No 2.

WILLIAM ROGERS Merchant in Virginia *against* CATHCART and KER.

CONSTITUENTS found liable to pay money borrowed by their supercargo, though neither did his commission bear any express power to borrow money, nor was it applied to their behoof, See APPENDIX.

Fol. Dic. v. 1. p. 280.

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1750. January 3. SIMPSON *against* M'TIRIE and ROBERTSON.

WHERE a master is empowered to let out the ship, he is entitled to demand payment of, and to discharge the freight; but the owners are not obliged to al-