

No 21. there was neither *dolus* nor *lata culpa* chargeable on the *mandatarius*; but any negligence and omission, (not having exactly followed his mandate,) lay at his door, even as if an advocate should delegate another to manage for him, he must be answerable, because in such cases *industria personæ* is elected. And there was ground of suspicion against the factor; and it was not proved that he had trusted his own part of the cargo to him, as he had alleged; and there is no less diligence required in a mandatary's executing his commission than he uses to exhibit in his own affairs. Law impedes him not to substitute, but if he do, he must take his hazard of the event, and not throw it over on his constituents. But the LORDS would not have required this exact diligence of him *quæ* skipper, had he not also been supercargo, with a special commission and trust, because he had been oft there, and had the Swedish language.

*Fol. Dic. v. 2. p. 58. Fountainball, v. 1. p. 733.*

1707. March 7.

LORD INVERURY *against* JAMES GORDON, Merchant in Edinburgh.

No 22.

A merchant who sold wine, was desired by the buyer to purchase a cask to put it in, to be carried by sea. The cask having been insufficient, the merchant was found liable to restore the price.

INVERURY having bought 18 gallons of Florence wine from Gordon, and he telling he had no less than a butt, he desired him to get him a cask and hogshead to draw it off, to be shipped on board a vessel then lying at Leith, and shortly to sail to the north. Accordingly he went to a couper, and got him a cask, which he looked on as sufficient, and put the wine into it, and shipped it; but the ship being retarded with contrary winds, ere it came to Inverury, it was found the wine had syped out, and so was all lost and spilt. My Lord pursues Mr Gordon for the damage, he having furnished him with a leaky insufficient cask, though he had trusted the care of it to him.—*Alleged*, He can never be liable, for all his concern was to deliver him the wine; but to provide him a cask to put it in was a mere act of kindness and friendship done at my Lord's desire, to serve him *tanquam quilibet*; likeas it stood twenty-four hours before it was boated, and not the least appearance of any defect, and was shipped, and so received by the skipper in good condition; but a storm having risen, they were driven into the Wemyss harbour, and, by the agitation of the ship, it might have got a dash, so that either the couper, furnisher, or the skipper may be answerable; but it is impossible to reach Mr Gordon, who only bestowed his pains; and so it was *locatio operæ tanquam proxeneta*, and no more.—THE LORDS, before answer, allowed a conjunct probation as to Bailie Gordon's undertaking the trust of furnishing a cask, and what trial was taken of it before the wine was put into it; and if the loss was casual and accidental, or by any latent defect and insufficiency in the cask; and the LORDS coming to advise the testimonies of the witnesses adduced *hinc inde*, Mr Gordon *alleged*, That no more diligence could be required of him than what he had done; for he being desired to look at a cask, he did so, and saw no visible fault in it; and by the

custom of all the trading nations, the latent insufficiency of goods affording redhibition can never oblige the furnisher, as is clear by the Roman law, *tit. Dig. et Cod. De edicto adilitio, Si venditor vitium ignoraverit, non tenetur ad damnum ex re vitiosa provenientem*, especially, *si gratuito intervenit*; and although a man should, in selling a slave, commend him, that will not import he is endued the philosophical virtues, *et consilii non fraudulentum nulla est obligatio*; and where a loss is ascribeable either to fault or fatality, law presumes it rather to be *ex casu quam ex culpa*; and he cannot be supposed to have undertaken sea hazard. But the LORDS, on advising the probation, found it proved, that Mr Gordon had undertaken to furnish the cask; and that the cask was insufficient, and through its insufficiency the wine had run out; and so found him liable; which would import, if he had received the price, then to restore it, and if not, then to assolzie my Lord from payment of it. Some thought all that Mr Gordon did in this case was *nudum ministerium* to accommodate and serve my Lord, and that *officium nemini debet esse damnosum*, unless *culpa vel dolus* can be qualified; but here the LORDS found he had interposed to uphold and warrant it, and had said a double cask was needless.

*Fol. Dic. v. 2. p. 48. Fountainball, v. 2. p. 356.*

1711. January 2.

GEORGE GIBSON, Skipper in Borrowstounness, and ANDREW WILSON, Writer his Assignee, against ROBERT LEITH, Writer in Edinburgh.

ROBERT LEITH, writer in Edinburgh, and others, gave a commission to George Gibson to buy for them a ship in Holland, and accepted bills for the price of their respective shares; particularly Robert Leith accepted a bill of L. 50 Sterling, payable to George Gibson or order, at Martinmas 1709, as the price of a twelfth part of the ship, upon his delivering a vendition thereof to Mr Leith. Sometime after the ship was bought and brought home to Scotland, and had there suffered a disaster in breaking of her back. George Gibson offered a vendition of the twelfth part to Robert Leith, upon payment of the L. 50, his share of the price, and upon his refusal protested the bill, and charged him to pay. Robert Leith suspended upon this ground, That the vendition not being offered *debito tempore*, while *res* was *integra*, he is not obliged to accept of a damnified ship in place of a sound one for his money. And Gibson being *dominus* by buying the ship, and taking the right thereof in his own name, the *periculum* was his till he denuded by a vendition. For the commission gave not the suspender *jus in re*, but only *jus ad rem*, to claim a vendition by an ordinary action; notwithstanding whereof Gibson, having a complete right to the ship in his person, might have sold her effectually to another; and *res perit suo domino*.

No 22.

No 23.

A party accepted a bill for a sum, as the price of a part of a ship he had commissioned the drawer to buy for him, payable to the drawer or order, upon his delivering a vendition to the acceptor. The bill found due, although the ship was bought by the drawer in his own name, and he never offered the vendition till after the