

No 4.

the established rule, that the ship must bear her own loss, and the proprietor of the cargo his : See *Ordonn. de Louis XIV. tit. Charter-parties, art. 8.*

Neither is the obligation granted by the defenders' correspondent in the Grenades sufficient to put this case out of the common rule. ' Arrests, restraints, and detainments of all kings, princes, and people,' are part of the dangers expressly provided against by a policy of insurance; but this obligation, being destitute of the necessary solemnities, cannot be equivalent to a policy. The only meaning of it was, to make the master easy by promising to indemnify him, in case the run to Cape Fear should be found to have been an irrational or improper step.

THE LORDS found, ' That the master had no power to alter the destination of the ship, or undertake a new voyage ; and, therefore, found the defenders liable for the delay which happened in consequence of the run to Carolina.'

Act. Lockhart, Solicitor Dundas.

Alt. Maclaurin, W. Craig.

G. F.

Fol. Dic. v. 3. p. 194. Fac. Col. No 93. p. 172.

1783. November 20.

RICHARDSON and Co. *against* STONER, HUNTER, and KER.

No 5.

A purchaser from a shipmaster, of a cargo which the purchaser knew had not arrived at the place of its destination, is liable to the owners in damages.

IN the end of the year 1776, Messrs Richardson and Company of Perth, freighted a ship to carry a cargo of salmon to the market of Venice. The vessel having met with unfavourable weather, had reached the coast of Spain only upon 19th Feb. 1777. On that day she was attacked by a violent storm, which rendered it necessary to throw over board a part of her cargo, and immediately to make for the nearest port, which was that of St Lucar. At that place, having at length refitted his vessel, the shipmaster, doubtful concerning his future conduct, sought the direction of Messrs Stoner and Company, a respectable mercantile house there, to whom he showed his instructions concerning the destination of the voyage. The advice of those gentlemen was, rather to dispose of the cargo in Cadiz, though at an under value, than by proceeding at so late a period to Venice, to run the hazard of losing the benefit of the season of Lent. They likewise offered to execute the sale on his commission in quality of factors, which they afterwards did ; and in their whole proceeding they seemed to have considered themselves as conferring a benefit on the Scottish merchants.

The price procured at Cadiz being greatly inferior to that which was expected to be obtained in the market of Venice, Richardson and Company, on account of that interference, instituted, in the High Court of Admiralty, an action of damages against Stoner and Company, in which the Judge-Admiral pronounced a decree in favour of the latter. That judgment having been brought

by process of reduction under the review of the Court of Session, Richardson and Company, the pursuers

Pleaded; Our property has been taken from us without our consent, and the defenders have done this wrong. Perhaps they had not a fraudulent design; but their conduct must then have been foolish in a high degree. They knew the destination of the vessel, for they had read the instructions given to the shipmaster; and as they ought not to have been ignorant that shipmasters, whose office is confined to navigation alone, and whose sole official relation is to the owners of the ship, not the proprietors of the cargo, have not the powers of a supercargo, to authorise their intermeddling with the goods on board; this shipmaster's content will not justify so illegal an act; *Voet. Comm. ad tit. D. De exercit. act.*; *Heinec. Fascicul. Script. De jur. naut. et maritim. cap. 15.* The pursuers therefore seek reparation of the wrong resulting to them, not merely from the improper advice, but from the actual deed of the defenders.

Answered; The fairness of the intention which actuated the defenders is as indisputable as the maxim, that '*consilii non fraudulenti nulla est obligatio.*' Though by an unauthorised conduct they had occasioned damage to the pursuers, their *bona fides* is such as in equity would have screened them from making reparation. *Princip. of Eq. b. 3. c. 2. p. 201.* In fact, they proceeded not without sufficient authority. The appointment of a supercargo, it is true, must free a shipmaster from the charge of his loading; but to suppose that, where there is no supercargo, the master ought in all events to keep himself at a distance from the goods, whatever loss this should produce to the owners, is an idea that in itself seems ridiculous, and certainly is not recognised by mercantile or maritime law, which would even permit a shipmaster to relieve himself of an exigency, by selling the goods on board; *Molloy, b. 2. chap. 1. § 4. chap. 2. § 13, 14, 16.*; *Laws of Oleron, chap. 22.*; *Magens on Insurances, art. 264.* The interference then of the defenders, in its motive so unexceptionable, is likewise strictly to be justified from the powers of the shipmaster.

THE LORD ORDINARY 'found, that the defenders having, without any warrant or authority, indeed contrary to the orders of the pursuers, which they were well informed of, intromitted with and disposed upon the cargo of salmon aforesaid, belonging to the pursuers, are liable in payment to the pursuers of the value of said cargo of salmon so intromitted with by them, at the price the same would have sold for at Venice, the port of destination.'

The defenders having reclaimed to the Court, the LORDS, 'on advising their petition, with answers, replies, and duplies, adhered to the interlocutor of the Lord Ordinary.'

Another reclaiming petition was preferred by the defenders, and answered by the pursuers, when the COURT 'altered their former interlocutor, and assoilzied the defenders.'

No 5.

The pursuers then put in a reclaiming petition, upon advising which with the answers, the LORDS having departed from the last mentioned judgment, returned again to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Ellick.*
 Alt. *J. Fergusson, H. Dundas, Fraser Tytler.*

Act. *M'Intosh, Wight.*
 Clerk, *Home.*

S.

Fol. Dic. v. 3. p. 194. Fac Col. No 125. p. 198.

See APPENDIX.