

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.

No 43.

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

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to be imputed to the skipper, his ship before sailing having been visited and found sufficient. THE LORDS, after allowing, before answer, a mutual probation of the damage, found the skipper liable, unless he could prove the leaks were struck up by a storm, or other stress at sea; for else merchants following the skipper's faith, that the ship is good and tight, might be ruined.

*Fol. Dic. v. 2. p. 59. Fountainball, MS.*

\* \* \* Stair reports this case :

By charter-party betwixt Boswell, Provost of Kirkcaldy, and Colin Lamont, skipper, the skipper was obliged to have his ship tight and in order, and to perfect a voyage from Kirkcaldy to Dantzick, and homeward, for which Boswell was to pay him 800 merks of freight; whereupon Boswell being charged, he suspended upon this reason, that he having embarked sixteen packs of lint in Dantzick, ten packs of it was spoiled by sea water in the Road of Dantzick, and thereupon was sent a-shore, and brought home by another ship. It was *replied*; That this was *casu fortuito*, by a leak which struck up in the ship, for she was tight both when she loosed at Kirkcaldy, and was repaired at Dantzick, before the lint was embarked. It was *duplicated*, That the skipper having hired the ship to a merchant for import and export of ware, he was answerable for all damage the ware should sustain; and by the law, *nautæ, cauponæ, stabularii ut recepta restituant, &c.* which is in vigour by our custom, The masters and owners of ships are liable to the merchant for all damage by a leak in the ship, or otherwise, except it were occasioned by extraordinary stress of weather at sea, which could not be prevented; but if an ordinary leak should liberate the skipper, it would ruin trade, for the skipper should know the condition of his ship, which the merchant cannot, and therefore the craziness of the ship, or any thing arising therefrom, must be upon the skipper's peril.

THE LORDS having, before answer, ordained witnesses to be adduced by both parties upon the damage, and the cause of it; which being this day advised, it was proved that the ship was repaired at Dantzick, before embarking of the lint, and yet in that Road a leak struck up, and spoiled ten packs of the lint; and seeing no extraordinary accident was proved, either by stress of weather or otherwise, the LORDS found the skipper liable for the damage.

*Stair, v. 2. p. 791.*

1680. July 30.

LUMSDEN, Skipper in Aberdeen, against ROBERT LORIMER, Merchant there.

No 44.

ALLEGED no freight due, because its an uncontroverted maxim in maritime law, *quod naufragio facto nauulum non debetur.* Answered, The skipper cannot exempt to this *casus fortuitus*, and though the ship was broke, yet the loading