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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.

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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

was saved. THE LORDS found the freight due, deducting as much thereof, as the merchant should instruct he was damnified by the landing of the ship in the place where she broke, and tried the damage, by comparing the price of the loading as it was sold in the place it was cast in, with the prices it would have given in Aberdeen, which was the port to which they designed.

No 44.

Fol. Dic. v. 2. p. 59. Fountainhall, MS.

1732. February 12. LUTWIDGE against GRAY.

By charter party, a shipmaster having become bound to transport a loading of tobacco from Virginia to Port Glasgow, and the merchant to pay a certain freight per tun; the ship in her return was wrecked on the coast of Ireland, but most of the cargo was saved and got upon shore, some of it much damnified. So soon as the freighter got notice of this disaster, he sent an agent to Ireland, who, upon paying salvage, got the goods delivered to him; some of them he shipped for Bristol, in order to be abandoned to the insurers, the remainder he carried straight to Glasgow. In a process for the freight, the LORDS found, That the contract of affreightment was dissolved by the total loss of the ship, albeit some of the shipwrecked goods were saved out of the shipwreck; and that the freighters indorsing the bill of lading to the insurers did not subject the freighters to any freight for the goods recovered by the insurers; but found the merchant liable for the freight *pro rata itineris* of such of the goods as were brought to Glasgow, notwithstanding that part of the tobacco was found damnified and burnt there. See APPENDIX.

No 45.

Fol. Dic. v. 2. p. 46.

1802. January 15. HESLITINES against ARROL and COMPANY.

In the month of January 1800, Arrol and Company, grocers in Edinburgh, gave an order for three chests of tea to the agent of Messrs Edward and Thomas Heseltine, wholesale tea-dealers in London. They accordingly sent to the wharf at London the tea, as commissioned to be shipped for Arrol and Company by the Berwick Shipping Company, who employ a number of packets in the trade between London and Leith.

They were informed, that the goods would be put on board the Kelso Packet; Robert Moir, master. Accordingly, the invoice was made out in these terms, and a letter of advice to this effect was dispatched, (6th February 1800,) to the defenders. Upon sending, however, again to the wharf in the evening, they learned from the wharfinger, that the tea would be sent by the Union Packet. They therefore altered the invoice, and deleted the name of the vessel, "Kelso,

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Goods shipped upon commission by a London merchant are at the risk of the consignee, altho' there be a mistake in the invoice.