

Leith, with timber, by a charter-party; Umphray thereupon charges for the freight. Neilson suspends upon this reason, That after a part of the timber was embarked, the admiral arrested the timber; and the said Cornelius wrote to the skipper, that he would satisfy him for the time of his attendance, and desired him to disload what he had embarked; which he did accordingly: And, therefore, seeing he had found the ship at Aberdene, where he had freighted the same, and that he had been impeded to fulfil the charter-party, without his fault, and that the charger had accepted of his offer, and disloaded accordingly, he could not be liable for the freight. And, albeit the skipper came to the Road of Leith, on his way to Borrowstounness, the suspender was not liable, unless it could be instructed that he had lost a freight between the date of the charter-party and the time of disloading the timber, or sustained any other damage.

Which the Lords found relevant to liberate him from the freight, and to make him liable for all other damages.

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1676. November 14. THOMAS LAWRIE *against* ANGUS.

THOMAS Lawrie, having shipped some silk-ware at Rouan, he obtained his bill of loading to be delivered at Leith when the ship landed there. He, finding the goods to be embezzled, pursued the skipper for damage, and obtained decret for 400 merks, for spoiling of the goods, and for 100 pounds for detention thereof. Angus, the skipper, gives in a bill of suspension: and the cause being appointed to be heard upon the bill, he insisted on this reason, That he was unjustly decerned, having proponed this relevant defence, that the spoiling of the ware was neither by his fault nor negligence; because he offered him to prove, that his ship and pump were sound, and in good condition, at his loosing; and that he had stowed the pursuer's ware in a safe and convenient place of the ship; but that he himself had changed them from that place of the ship, and had put them low in the hull of the ship, near the pump, that they might be less accessible to *capers*, lest they had come to search the ship: so that he had done all that was his part as a diligent and provident master, who would only have put such ware as would not have spoiled with water near the pump. And as for the detention, he had good reason to detain the ware till the freight was paid.

It was ANSWERED, That the master of the ship, by his office and contract of conduction, is obliged to preserve the merchant's ware safe; and nothing can exoner him but such force or *casus fortuitus* as he could not foresee or prevent: so that no leakage in his pump can liberate him, unless it had been incident by stress of weather, which could not have been repaired at sea; which is not alleged. Neither is it relevant, though it were true, that the merchant stowed his goods near the pump, seeing the pump should have been sufficient against leakage; neither did the skipper show the master any hazard in that place more than the other.

The Lords found the reason of detention of the ware, till the freight was paid, relevant; and found the other reason also relevant, that, when the ship loosed, the pump was sufficient against any leakage, which leakage fell in by the

way, and could not be prevented or helped ; without necessity to allege stress of weather : and that he had stowed the ware in a convenient safe place ; and the merchant had changed the same, and put them by the pump. But it was not alleged that the skipper was present ; or whether he showed any hazard in that place.—[See page 212.]

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1676. *November 15.* EARL of TWEDDALE *against* The LAIRD of DRUMELZIAR.

THE Earl of Tweddale gave in a bill, representing, That Robert Fergushill was adduced as a witness to astruct the verity of a disposition, bearing to be granted by the late Earl to Drumelziar, of certain lands ; and bearing, that the said Robert is writer and witness, and that he had information of several grounds against the inhability of the said Robert ; and therefore desired that he might not be received till the conclusion of the cause.

Which the Lords refused, in respect of their common custom that all witnesses are admitted, unless relevant objections be instantly verified against them ; for, if that cannot be, parties can only protest for reprobators : and, therefore, the Lords ordained the witnesses to be received ; and, if any relevant objection were proponed and instructed, ordained the Ordinary to discuss and admit the same. And further, declared, that if the petitioner condescended upon relevant objections, to be instructed before advising the cause, they would admit the same upon a summary citation against Drumelziar and Fergushill himself.

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1676. *November 15.* The LAIRD of CUNNINGHAME-HEAD *against* The EARL of LOWDOWN.

THE Laird of Cunninghame-Head,—having procured a joint right to the first apprising of the estate of Lowdown, led by Mr Livingstoun his son and heir,—pursues for maills and duties effeiring to his proportion ; and several interests of other parties being produced, there was an auditor named to discuss the same. There is now a supplication given in for Cunninghame-Head, representing, That the Earl of Lowdown's advocates, by dropping in of seasines of several parties from time to time, without warrant from these parties, had delayed the process for several years ; and therefore desired that no further delay should be upon that account.

The Lords ordained intimation to be made, that all parties pretending interest might produce such interests as were in town ; and that none should be admitted but upon the pursuer's declaring, upon oath, that they were employed by the parties to whom these rights belonged ; with certification, that no other should be admitted, before sentence, to stop this decret.

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