

1680. January 13. *Leslie, Sec. against Logan, &c.*

No 21.

An action for contribution, *ex lege Rhodia*. Vinnius, ad. l. 2. D. ad legem Rhodiam, p. 208. & Loesemus de jure maritimo, libro 2. cap. 8. p. 213. tell us, contribution is due where a ship runs ashore, pressed with a storm, but not where it is robbed. The Lords found no contribution due, because the ship might have gotten off, as appeared by the probation, and decreed for the salvage money, nam gravatus in uno est levandus in alio ob infortunium. The act of sederunt, 9th November 1679, allows the reviewing and reconsidering of bills given in *debito tempore* before the decreets be extracted. See SECT. 6.

*Fol. Dic. v. 2. p. 319. Fountainhall, MS.*

\* \* \* Stair reports this case :

MILNER, skipper, and LESLIE, owner, pursue Logan, Weir, and Others, merchants in Aberdeen, upon this ground, That their ship being freighted by them from France, in a voyage homeward, near the Mey, he was pursued by a Dutch privateer, in the time of the Dutch war, and two of the merchants being aboard, he did, by their advice, and the advice of the company, finding they could not escape, run in to the nearest shore, and made a hole in the bottom of the ship, that the privateer might not be able to carry her off; and this being at eleven o'clock in the morning, yet the privateer boarded the ship, and made an agreement to save the goods for L. 120 Sterling, for which he carried away one of the two merchants aboard, and that no use was made of the hole in the bottom of the ship, nor any water entered therein, so that the ship might have come off; but that same night, about twelve o'clock, a storm arose, which continued four or five days, and, at five days end, the ship was wrecked, and the skipper and seamen did disload the goods, and kept them safe several days, till they were carried away to Leith, and therefore conclude, that the price of the ship should be made up by contribution between the skipper and owners, according to the worth of the ship, and the merchants according to the proportion of their goods aboard, with L. 300 for his and his Company's expenses in discharging of the goods, and keeping them on the shore. This was the sum of the probation; at advising whereof, it was *alleged*, That the merchants could not be liable for any part of the loss of the ship, because it was the skipper's duty to carry their goods to Leith, and what he did for shunning the privateer was his duty as to the merchants; but, as to his ship, it was his own interest to preserve his ship from capture, which is clear by the hole that he struck up, which, if made use of, might have saved the ship, but he never did, nor could save the goods, which were French ware, and might have been carried away by the privateer, and therefore the merchants were forced to transact with him, and have paid the sum transacted for, wherein the skip-

No 21. per bore no part; 2do, It is clear by the probation, that the ship perished, not by running aground, or by any leak, by the hole made of consent, but that she might have gone off safe, and that she was not broken till five days after, which was *casus fortuitus*, having no necessary connection with the running ashore; and though there had been an express contract with the merchants to run her ashore, in case there could be no escape from privateers, and that the merchants, in that case, should contribute for the damage of the ship, yet this would never have been extended *ad casus fortuitus*, which are never undertaken but when expressed, but only *ad casum provisum*, viz. If the ship had been broken, or run ashore in a place which was not a known harbour. The pursuer answered, That *Leg. Rod. de Factu*, All damage for common safety should have a common contribution, which is the reason or motive of that law, which is now become the law of nations, and is not only extended for casting out of ware, for lightning of a ship, but to the cutting of masts, and the like, yea, to any ransom paid for both ship and goods; and likewise what the skipper did was *negotium utilitur gestum* for the merchants. It was replied, That, by the rule of common justice, when any party does any deed necessary for preservation of his own interest, though thereby greater advantage arise to others, it founds no action for bearing a part of the expenses; as if any man improve a writ, wherein not only his lands, but many others are disposed, he hath no action against them for any charges or expenses, because he acted on his own account, and their advantage is but consequential. Neither was that ever interpreted to be *negotium gestum*, and therefore *L. R. de Factu*, was not a declaratory, but statutory law; and though it do now become a law of nations, it cannot be extended *ad pares casus*; for the motives or narratives of statutes do only infer a conveniency, and not a duty or right, except where the law is declaratory; so that, without that law, any person throwing goods overboard, would have no action for contribution of the rest, because what he did was upon his own account, and for his own safety, which if it might have saved him and the ship, as he thought, he would not have forborn, though all concerned would have contradicted it. But to encourage persons so to do for common safety, the Rodian law was introduced, which will not be extended to other cases, and so cannot infer whatever is expended, having a common advantage, should be repaired by all that get advantage; yea, the most common rule in equity, *quod nemo debet locupletari ex alterius damno*, doth only take place where that *damnum* is expended or done not upon account of the expender; but there is nothing of the *Leg. R. de Factu* extending to his case, which, if sustained, would infer that whenever a ship is broken, and the goods safe, the merchants should pay for the damage, it being easy to make pretences to run ashore, as well to shun a storm as capture by privateers; in which case, the whole probation must necessarily be by the seamen, as it is in this case, where they prove a storm to be five days without intromission, to connect the storm with the running a-ground. It is true, that if a seaman cut his mast with

consent of the merchants, he may ask reparation, but when it is overturned by storm, piracy, or accident, it infers no contribution.

No 21.

THE LORDS found no contribution in this case, and assolizied from the libel, except only as to the skipper's and company's disloading, and keeping the goods on the shore, for which they modified L. 300 to be paid proportionally by the merchants, according to their proportions of the goods in the ship, and if they prove not their proportions, that they shall all pay equally.

*Stair, v. 2. p. 737.*

1706. February 20.

WILLIAM HALIDAY, Burgess of Edinburgh, and ARTHUR TEMPLE, against  
ADAM GARDINE of Greenhill.

IN the action at the instance of William Haliday, assignee by Arthur Temple, liferenter of a tenement of houses in Edinburgh, against Adam Gardine the fiar, for declaring the said tenement affected with, and adjudged for payment of the expense wared out by the cedent, in repairing and rebuilding thereof, after it was demolished by occasion of fire;

*Alleged* for the defender; No law obligeth any fiar of houses demolished by a public calamity to rebuild or repair the same for the use of a liferenter, who ought to suffer loss by the misfortune as well as the fiar; and, therefore, the whole expense of rebuilding and repairing cannot affect the property; for liferenters of houses are bound to preserve them in the condition they receive them, and no fiar *tenetur ob casum fortuitum*. If the tenement were affected with this bygone reparation, and should happen again to be burnt in the liferenter's time, the sum affecting the area would exhaust the value before the fiar succeed, and so the liferenter get the property by the reparation; yea, the very reparation will fail in time, and perhaps be of no great value to the fiar at the liferenter's death. *2do*, *Esto* the fee of liferented tenements, demolished by fire, were affectable by the expense of rebuilding and reparation laid out by the liferenter; this could only be extended to what was necessary to put them in as good case as they were in before the burning. *3tio*, By the Act 10. Article 5. Par. 4, Q. M. a liferenter making necessary and profitable reparations, his executors get only a third part thereof, and for so much only can affect the tenement.

*Answered* for the pursuer; The necessity and quantity of the expenses of the reparation being cognosced and proved by the Dean of Guild's warrant and decret, the same ought to affect the ground-right and property, as *in rem verso* to the fiar; and the liferenter's case is as favourable as that of any *negotiorum gestor*.

No 22.

The fee of a tenement, repaired by the liferenter, affected with the principal sum expended in the repairs thereof, but not burdened with annual-rent of the repairs during the liferenter's life.