No 37. that law can go no further, without manifest injustice: For, how can one person have a claim upon another, who run no risk, suffered no damage, and who has subjected himself to no disadvantage upon his account, as in the present case? Where nothing is given up, surely nothing can be demanded; and, if Mr Landale, by following the only course which he could possibly take for the preservation of his crew and vessel, happened at the same time, by the bye, to contribute in some measure to the safety of the cargo, the defenders were so far lucky, that the conduct which was necessary for the pursuer was also convenient for them; but they cannot conceive that they can possibly be bound to any pecuniary contribution, as he did not give up one *jota* of his own interest, nor suffer the smallest detriment upon their account. What he did, was merely the effect of necessity, and he must have done it for his own preservation, whether he had had a cargo aboard or not; he actually did this, and no more; consequently he is entitled to no retribution; *vide* Voet ad L. Rhod. § 5. Vinnius in his Commentary upon Peckius ad L. Rhodiam.

It may be also observed, that, in every case where the ship suffered the damage, by the Lex Rhodia, the claim of contribution was always allowed with more difficulty, than where any part of the cargo itself had been lost; because the ship was considered as more particularly bound to run every risk to carry the goods safe to the destined port; L. 6. in fine de L. Rhod. D. et l. 2. § 1. eod. in medio. Sea Laws of France, 1681, l. 1. tit. 8. § 14.; and Magens, vol. 1. p. 53. and 67.

"The Lords found it sufficiently instructed, That the ship the Old Briton of Leven was, upon the 27th of October 1760, run on shore, and stranded upon the sands of Belhelvy, by the master and mariners, *dedita opera*, and of set purpose, for the preservation of the men's lives, ship, and cargo; and therefore find, That the loss and damage occasioned by the ship's being run on shore must be sustained and paid by the owners of the ship, cargo, and freight, in proportion to the respective values of each; and find the defenders liable to contribute their shares of the said loss and damage, according to the values of the goods that each of them had on board."

Act. *Lockhart, Rae.* Alt. *Ferguson & J. Ferguson*, jun.

J. M. *Fol. Dic. v.* 4. *p.* 217. *Fac. Col. No* 123. *p.* 289.

1785. *July* 27. JOHN ROBERTSON *against* ROBERT BROWN.

No 38.
Damage sustained by a ship in a defence against a privateer, not made up by a general contribution.

A VESSEL employed in the carrying trade between London and Sealock, was attacked by a privateer; from which, after a smart action, she had the good fortune to escape. She, however, suffered considerable damage both in her hull and rigging.

The question therefore occurred, Whether the loss was a partial one, that is, to be borne by the owners of the ship alone; or if it was general, and fell

equally on the owners of the ship and of the cargo? Certificates were produced from eminent merchants in Glasgow, expressing their opinion that it was of the latter sort; but in others obtained at London, it was agreed, that although such a doctrine had been formerly received, a contrary practice had prevailed during the late war. No 38.

For John Robertson, who had made insurance on the ship, it was

Pleaded; According to the principles of the Rhodian law, every loss sustained by a ship, for the general safety, and to which, in effect, the preservation of the whole has been owing, is to be divided equally among those having interest. Nor can the application of this rule to the present case be attended with any doubt. It would indeed be singular, if the loss of a sail, or of a mast cut away in a storm for lightening the vessel, should be defrayed in common by the owners of the ship and of the cargo, while that occurring in a brave and successful defence against an enemy, devolved on the former only.

In the practice, accordingly, of every foreign nation of which we have any account, a damage of this sort, equally with any other, is made up by a general contribution; Ordinances of Rotterdam, No 291. 235. 307.; Magens, vol. 1. p. 64.; Wesket, *voce* AVERAGE, p. 25. § 3. The same principle appears to be entertained by the most eminent Scottish merchants, compared to which, in interpreting the commercial dealings of Scotsmen, the opinions of persons in London, when unauthorised, especially, by judicial decisions, and avowedly opposite to the practice of that city in former times, ought not to have any weight.

Answered for Robert Brown, the owner of the cargo; The mercantile practice of London, in a question of this sort, is deservedly of the highest authority. It is indeed to be viewed as the great Law Merchant of the British empire, a deviation from which, by any local custom or usage, as it would infallibly produce embarrassment in trade, ought to be anxiously avoided.

The reasonableness of its determination in the present case cannot well be disputed. It was only those losses which arose from the voluntary act of the shipmaster, as the cutting away of a mast, or the throwing of goods overboard, for which, by the Rhodian law, a contribution could be demanded. For goods, therefore, which had been lost by some extraneous accident, or for the rigging of the ship carried off by the violence of a storm, though from thence a benefit might eventually arise, such a claim was not admitted. The damage occasioned to a ship by the attack of an enemy evidently belongs to this last class, and is to be viewed in the same light.

As the articles of which a lading is composed are for the most part much more valuable than the ship, and at the same time apt to be more materially injured in an engagement, the owners of the latter alone are gainers by this decision. Nor to this can it be objected, that the loss suffered by the cargo does not contribute to the safety of the ship, and therefore does not fall within the general rule; for it is not the ship itself, any more than the cargo, but the

No 38. bravery of the mariners, and the arms in their hands, which are the means of preserving the whole.

It was likewise mentioned for the owner of the cargo, that the ship had been advertised as carrying arms for defence; but as no additional freight was stipulated on that account, this circumstance did not seem to have any weight.

The Lord Ordinary found, agreeably to the opinion of the London merchants, that no contribution was due; which judgment was adhered to by the Court, after advising a reclaiming petition and answers. A second reclaiming petition was presented, and refused without answers.

Lord Ordinary, *Braxfield.* For John Robertson, *Lord Advocate, H. Erskine.*
For Robert Brown, *Maclaurin.* Clerk, *Menzies.*

C. *Fol. Dic. v. 4. p. 218. Fac. Col. No 225. p. 351.*

SECT. VII.

Recompence claimed by a Surgeon.—Tutor.—Sheriff-substitute.—Commissioner for taking Oaths.—Political Agent.—Recompense claimed from a Trustee.

1709. *July* 6. Campbell of Ashfield *contra* Mungo Campbell of Netherplace.

No 39. The Court assumed the power of naming the gratuity to a surgeon for cutting for the stone, where they judged of his skill.

Duncan Campbell of Ashfield, giving himself out to be the best lithotomist and cutter for the stone, pursues Mungo Campbell of Netherplace, that he being under the unsupportable agony of the gravel, that he was kept down in his bed by two servants, sent for the said Duncan to cure him, who, leaving the great employment he had, came and waited on him for several weeks; and, by an emacerating diet, fited him for the operation, and then cut him, and brought away a big stone of five ounces weight, and since that time he has enjoyed better health, for which extraordinary cure all he got in hand was seventeen guineas, whereas, by his attendance and diversion from other patients, and his *lucrum cessans* he has lost more than L. 50 Sterling, and craves that sum as his fee and recompence of his damage. *Alleged*, That the gratification given of seventeen guineas was enough though the cure had been performed; but it was so far from it, that he wholly spoiled and mangled the defender, by his unskilfully cutting the *intestinum rectum* and his bladder, so that the excrements pass not by their natural channels, but come through the wound, which has so debilitated him that he can neither walk nor ride, but as he is carried. *Replied*, That the cure was according to all the rules of art; and if he be not so vigorous as he was, it is to be ascribed to the bigness of the stone, and his old age, being past 60, and to his own mal-regimen and misgoverment, and corpulency. The Lords thought the gratuity given sufficient, and refused any farther modification.

Fountainhall, v. 2, p. 510.